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ABSTRACT

Presented are eight congressional hearings on a joint resolution proposing an amendment to the Constitution of the United States relative to equal rights for women and men. The hearings focus on a constitutional overview; the impact of the Equal Rights Amendment (ERA) on private and parochial education, military law and policy, abortion policy, veterans' programs, the Social Security program, and homosexual rights; and defining discrimination under the proposed amendment. The text of the proposed legislation is provided. Testimony includes statements, prepared statements, and miscellaneous materials (newsletters, letters, reports, etc.) from U.S. Senators, Representatives in Congress, and individuals representing Cornell University, Hunter College, Harvard University, Rutgers University, University of California at Berkeley, Tulane University, Emory University, Veterans of Foreign Wars, American Legion, American Veterans Committee, Vietnam Veterans of America, AMVETS, University of North Carolina, National Endowment for the Humanities, Catholic University, Dickinson College, and various law firms. (YLB)

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S. Hrg. 95-1259, Pt. 1

THE IMPACT OF THE EQUAL RIGHTS AMENDMENT

ED255773

HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST AND SECOND SESSIONS

ON

S.J. Res. 10

A JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RELATIVE TO EQUAL RIGHTS FOR WOMEN AND MEN

MAY 26, SEPTEMBER 13, NOVEMBER 1, 1983; JANUARY 24, FEBRUARY 21,
MARCH 20, APRIL 23, AND MAY 23, 1984

PART 1

Serial No. J-98-42

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3

CONTENTS

(Part I)

Hearings held on:

Page

May 26, 1983 1
September 13, 1983 95
November 1, 1983 251
January 24, 1984 437
February 21, 1984 677
March 20, 1984 809
April 23, 1984 877
May 23, 1984 941

STATEMENTS OF COMMITTEE MEMBERS

Hatch, Senator Orrin G 1, 95, 251, 437, 677, 809, 877, 941
DeConcini, Senator Dennis 4, 142, 262, 501, 810
Grassley, Senator Charles E 5, 438
Thurmond, Senator Strom 6, 96, 911
Kennedy, Senator Edward M 7, 259
Biden, Senator Joseph R 10
Leahy, Senator Patrick J 42
Metzenbaum, Senator Howard M 252

PROPOSED LEGISLATION

S.J. Res. 10, a joint resolution proposing an amendment to the Constitution of the United States relative to equal rights for women and men 12

CHRONOLOGICAL LIST OF WITNESSES

THURSDAY, MAY 26, 1983

CONSTITUTIONAL OVERVIEW

Tsongas, Hon. Paul E., a U.S. Senator from the State of Massachusetts 14
Tucker, Marna S., attorney, Washington, DC, and Walter Berns, resident scholar, American Enterprise Institute 43
Hyde, Hon. Henry J., a Representative in Congress from the State of Illinois 82

MISCELLANEOUS MATERIAL

Text of H.J. Res. 208, 92d Congress 91
"Ratification History of Equal Rights Amendment," from the Congressional Research Service 92
"Standards of Review: Scheme of Analysis Used Under the Equal Protection Clause of the Fourteenth Amendment," from the Congressional Research Service 1983 94

TUESDAY, SEPTEMBER 13, 1983

PRIVATE EDUCATION

Rabkin, Jeremy A., assistant professor, Department of Government, and director, Program on Courts and Public Policy, Cornell University 98

Page
Shalala, Donna E., president, Hunter College of the City University of New York 113

MISCELLANEOUS MATERIAL

Questions from Chairman Strom Thurmond for Prof. Jeremy Rabkin 160
Responses of Prof. Jeremy Rabkin to questions from Senator Strom Thurmond 163
Responses of President Shalala to questions of Senator DeConcini 165
"Taking the ERA Literally," by James J. Kilpatrick, from the Washington Post, October 14, 1983 167
The doctrine of State action 168
Tax exempt status and the ERA 169
Donna's Dilemma, by Daniel Seligman, from Fortune magazine, Oct. 31, 1983 172
Dear colleague letter and analysis from Senator Orrin G. Hatch 173
Impact of the ERA upon private and parochial education, from the Subcommittee on the Constitution 174
Responses of president Shalala to questions of Senator Thurmond 175
"Women get a ticket to ride after train leaves the station," from the Stanford Observer, October 1983 184
"A Legal Analysis of the Potential Impact of the Proposed Equal Rights Amendment (ERA) on Private Single Sex Education Institutions," by Karen J. Lewis, from the Congressional Research Service, The Library of Congress, March 6, 1984 186
Statement of the U.S. Commission on Civil Rights on Civil Rights Enforcement in Education, June 14, 1983 248

TUESDAY, NOVEMBER 1, 1983

THE MILITARY

Packwood, Hon. Bob, a U.S. Senator from the State of Oregon 254
Cohen, Prof. Eliot A., professor, Harvard University, Department of Government; and Antonia Handler Chayes, partner, law firm of Csaplar & Bok 269

MISCELLANEOUS MATERIAL

Responses of Eliot A. Cohen to questions posed by Senator Strom Thurmond 362
Responses of Antonia Handler Chayes to questions of Senator Thurmond 363
Responses of Antonia Handler Chayes to questions of Senator DeConcini 367
"Impact of the ERA Upon the Military," analysis of the Subcommittee on the Constitution 371
Women's Equity Action League's responses on ERA impact 372
Letter from Henry Paul Monaghan, professor of law, Columbia University in the city of New York, to Rabbi N. Neuberger, Jewish Orthodox Coalition Against the ERA 375
"Report of the Subcommittee on Manpower and Personnel on the Rejection of Legislation Requiring the Registration of Young Women Under the Military Selection Service Act," from the Congressional Record, June 10, 1980 377
"Women in the Army—I," by Dan Cragg, from the Washington Times, June 2, 1983 378
"Women in the Army—II," by Dan Cragg, from the Washington Times, June 3, 1983 379
Rostker v. *Goldberg*, Supreme Court of the United States, opinion of the Court, June 25, 1981 381
Dissenting opinions 406, 409

TUESDAY, JANUARY 24, 1984

ABORTION RIGHTS

Garn, Hon. Jake, a U.S. Senator from the State of Utah, prepared statement on ERA's potential effect on American abortion law 440
Freedman, Ann E., associate professor of law, Rutgers University Law School, Camden, NJ; and John T. Noonon, Jr., professor of law, University of California at Berkeley, Berkeley, CA 451

Page

MISCELLANEOUS MATERIAL

- "The Equal Rights Amendment and Abortion, Why the ERA May Enhance Abortion Rights," from the Subcommittee on the Constitution 548
- "A Legal Analysis of the Potential Impact of the Proposed Equal Rights Amendment (ERA) on the Right to an Abortion or to the Funding of an Abortion," by Karen J. Lewis, Congressional Research Service, The Library of Congress, October 20, 1983 549
- Letter from Ann E. Freedman, associate professor of law, Rutgers University, to Hon. Don Edwards, chairman, Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, November 7, 1983 624
- Letters to Hon. Orrin G. Hatch from:
  - Lynn D. Wardle, professor of law, Orem, UT, January 16, 1983 626
  - Mitchael E. Smith, professor of law, University of California, Berkeley, February 2, 1984 629
- Letters to Doug Johnson, National Right to Life Committee from:
  - Paige Comstock Cunningham, executive director-general counsel and Thomas J. Marzen, chief staff counsel, Americans United for Life, January 5, 1984 630
  - Grover Rees III, assistant professor, School of Law, University of Texas, December 7, 1983 632
  - Senator Florian Chmielewski, chairman, employment committee, senate, State of Minnesota, January 10, 1983 633
    - Letter from Paul Freund, Harvard Law School, to Senator Florian Chmielewski, April 25, 1984 634
- Letter to Ms. Cres Apprill, St. Louis, MO, from Thomas I. Emerson, Yale University Law School, January 15, 1974 635
- Memorandum from the law offices of Ball & Skelly, January 16, 1984 636
- "ERA and Abortion," by Cardinal Bernardin, from the Chicago Catholic, February 24, 1984 637
- "Bishops Say They Will Oppose ERA Without Anti-Abortion Amendment (570)," from NC News Service, April 19, 1984 638
- "Abortion Rights Where Do We Go From Here?" by Rhonda Copelon, from Ms., October 1983 639
- Resolution on ERA passed at National NOW Conference, October 2, 1983 640
- Excerpts from *Joanne Fischer, et al.* v. *Department of Public Welfare, et al.*, February 7, 1984, in the Commonwealth Court of Pennsylvania 641
- Excerpts from *Joanne Fischer, et al.* v. *Department of Public Welfare, et al.*, Brief of Appellants, November 28, 1984, in the Supreme Court of Pennsylvania 644
- Excerpts from *Rosie J. Doe, et al.* v. *Edward Maher, et al.*, Superior Court, District of New Haven, October 9, 1981 655
- Excerpts from *Moe* v. *Secretary of Administration*, 417 N.E. 2d 387 (Mass. 1980) 657
- "From the Executive Director's Desk," August 1980 Docket, newsletter of the Civil Liberties Union of Mass 657
- Excerpts from *Hawaii Right to Life, Inc.* v. *Andrew I.T. Chang*, motion to intervene, in the Circuit Court of the First Circuit, State of Hawaii, May 1, 1978 659
- "The E.R.A./Abortion Link and How It Can Be Broken," by Douglas Johnson, NRLC legislative director, from the National Right to Life Factsheet 661
- "E.R.A. and Abortion: Really Separate Issues?" by Douglas Johnson and Paige Comstock Cunningham, from America, June 9, 1981 665
- Letter to Hon. Jake Garn, U.S. Senate, from Lincoln C. Oliphant, counsel, U.S. Senate Republican Policy Committee 670

TUESDAY, FEBRUARY 21, 1984

VETERANS PROGRAMS

- Meloy, Michael, attorney at law, Helena, MT; Prof. Gary L. McDowell, Tulane University; Charles A. Shanor, dean, Emory University School 678

Page

Schwab, Donald H., director, National Legislative Service, Veterans of Foreign Wars of the United States, accompanied by Kim Graham, Veterans of Foreign Wars of the United States; E. Philip Riggin, director, National Legislative Commission, the American Legion; June A. Willenz, executive director, American Veterans Committee, accompanied by Frank E.G. Weil, counsel; Dennis K. Rhoades, Vietnam Veterans of America; and David J. Passamaneck, national legislation director, AMVETS 721

MISCELLANEOUS MATERIAL

Letter to Hon. F. James Sensenbrenner, Jr., ranking minority member, Subcommittee on Civil and Constitutional Rights, House of Representatives, from:
  A. Leo Anderson, liaison officer, State Directors of Veterans Affairs, Inc., October 17, 1983 762
  John B. Engberg II, OCH, national adjutant, Regular Veterans Association, October 12, 1983 763
Statement on the impact of the equal rights amendment on veterans programs, by Phyllis N. Sega, Esq 764
The ERA and Veterans Programs (some quotes), from the Subcommittee on the Constitution 773
Personnel Administrator of Massachusetts et al. v. *Feeney*, Supreme Court of the United States, Syllabus, October term, 1978 776
  Opinion of the Court 779
  Dissenting opinion 801

TUESDAY, MARCH 20, 1984

SOCIAL SECURITY

Sherburne, Jane C., Washington, DC; and Judith B. Finn, economist and author 811

MISCELLANEOUS MATERIAL

Statement by Robert J. Myers, former U.S. Commissioner of Social Security Administration 868
Statement by Margaret Feldman, Ph.D., professor, retired 875

MONDAY, APRIL 23, 1984

DEFINING DISCRIMINATION

Wegner, Prof. Judith Welch, University of North Carolina School of Law; and Prof. Edward J. Erler, National Endowment for the Humanities 878

MISCELLANEOUS MATERIAL

"Constitution Isn't Place for Remediation of Bias," by Carol Tyler, from the Wall Street Journal, January 25, 1984 935
Excerpts from a Commentary on the Effect of the Equal Rights Amendment on State Laws and Institutions, prepared for the California Commission on the Status of Women's Equal Rights Amendment Project, by Anne K. Bingaman 937

WEDNESDAY, MAY 23, 1984

HOMOSEXUAL RIGHTS

Marcin, Prof. Raymond, Catholic University School of Law, accompanied by Prof. Eugene W. Hickok, Jr., Dickinson College 942

MISCELLANEOUS MATERIAL

"The Legality of Homosexual Marriage," from the Yale Law Journal, vol. 82; 573, 1973 985

Page

"A Legal Analysis of the Potential Impact of the Proposed Equal Rights Amendment (ERA) on Homosexuals," by Karen J. Lewis, from the Congressional Research Service, the Library of Congress October 12, 1983 1002
"Partnership Law Vetoed on Coast," by Wallace Turner, from the New York Times, December 10, 1982 1021
"Homosexual Weddings Stir Dispute," by Edward A. Gargan, from the New York Times, September 5, 1984 1022
"The State Equal Rights Amendments and Their Impact on Domestic Relations Law," by Paul M. Kurtz, excerpts from the Family Law Quarterly, volume XI, No. 2, summer 1977 1024

ALPHABETICAL LISTING AND MATERIALS SUBMITTED

Berns, Walter:
  Testimony 58
  Prepared statement 61
Burdick, Senator Quentin N.: Prepared statement 97
Chayes, Antonia Handler:
  Testimony 283
  Prepared statement 289
Cohen, Prof. Eliot A.:
  Testimony 269
  Prepared statement 275
Erler, Edward J.:
  Testimony 893
  Prepared statement 897
Finn, Judith B.:
  Testimony 828
  Prepared statement 833
Freedman, Ann E.:
  Testimony 451
  Prepared statement before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, November 3, 1983 533
Garn, Hon. Jake:
  Prepared statement 440
  Letter from Lincoln C. Oliphant, professional staff member, U.S. Senate Republican Policy Committee 443
Hickok, Eugene W., Jr.:
  Testimony 958
  Prepared statement 963
Hyde, Hon. Henry J.: Testimony 82
Kennedy, Senator Edward M.:
  Opening statements 7, 259
  Excerpts from REF WAC, Part 1, Women Content in the Army—Reforger 77 308
Marcin, Prof. Raymond:
  Testimony 942
  Prepared statement 949
McDowell, Gary L.:
  Testimony 703
  Prepared statement 707
Meloy, Michael: Testimony 678
Noonan, John T.:
  Testimony 455
  Prepared statement 464
  Responses to written questions from Senator Thurmond 489
Packwood, Senator Bob: Testimony 254
Passamaneck, Davids [illegible]: Testimony 756
Phillips, Dean K.:
  Testimony 681
  Letter from Phylis G. West, legislative aide, National Organization for Women, July 29, 1979 683
  "ERA Threatens Absolute Veterans' Preference," from the Stars and Stripes—the National Tribune, March 29, 1984 683
  Prepared statement 687
  "NOW Leader Says Military Draft Causes Brutality Against Women," by Lyle Denniston, from the Washington Star, March 3, 1981 691

Page

Phillips, Dean K.—Continued
  Letter from Charles W. Hinkle, Director, Freedom of Information and Security Review, Office of Assistant Secretary of Defense 692
Rabkin, Jeremy A.:
  Testimony 98
  Prepared statement 101
Rhoades, Dennis K.:
  Testimony 749
  Prepared statement 752
  Letter to Senator Hatch, June 20, 1984 755
Riggin, E. Philip:
  Testimony 730
  Prepared statement 732
Schwab, Donald H.:
  Testimony 721
  Prepared statement 723
Shalala, Donna E.:
  Testimony 113
  Prepared statement 117
Shanor, Charles A.:
  Testimony 693
  Prepared statement 698
Sherburne, Jane C.:
  Testimony 811
  Prepared statement 814
Tsongas, Senator Paul E.:
  Testimony 14
  Prepared statement 15
Tucker, Marna S.:
  Testimony 43
  Prepared statement 51
Wegner, Prof. Judith Welch:
  Testimony 878
  Prepared statement 884
Willenz, June A.:
  Testimony 735
  Prepared statement 738
  Letter from Elizabeth L Chittick, president, National Women's Party 743

THE IMPACT OF THE EQUAL RIGHTS AMENDMENT: CONSTITUTIONAL OVERVIEW

THURSDAY, MAY 26, 1983

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:45 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Thurmond, Kennedy, DeConcini, Grassley, Leahy, and Dole.

Staff present: Stephen Markman, chief counsel; Randall Rader, general counsel; Phil Barker, professional staff member; Sharon Peck, clerk; and Marci Anderson, clerk.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. Ladies and gentlemen, we are happy to welcome all of you here to the first in a series of hearings by the Subcommittee on the Constitution on the proposed 27th amendment to the Constitution, the equal rights amendment.

This is the first hearing on this subject by a committee of the U.S. Congress in more than a dozen years. During this dozen-year period, the equal rights amendment has generated one of the most turbulent debates in the constitutional history of this country.

Originally proposed as an amendment to the Constitution by Congress in March of 1972, the ERA appeared likely to be ratified by the necessary three quarters, or 38 States, in remarkably short order. Within a matter of hours of final Senate action, the State of Hawaii, with virtually no debate, became the first State to approve the amendment.

Within the first month, with equally little debate, the ERA had gained the ratification of 14 States. Within the first year of its 7-year ratification period, the amendment had gained the support of 30 States, only 8 shy of the necessary number. The ERA appeared certain to become a permanent part of the organic law of this land.

Final ratification, however, was never to come with only five additional States ever choosing to ratify. In 1978, in an unprecedented last-ditch effort to salvage the amendment, Congress, in a still controversial action, voted to extend the impending ratification deadline for the ERA by approximately 3½ years.

This, too, was of no avail, with not a single additional State choosing to ratify the ERA during this extension period. All told, the ERA, when it succumbed last June, had been ratified by a mere two States during its final 8 years and not a single State during its final 5½ years—this despite the fact that in the nonratifying States, there occurred more than 100 separate debates in the State legislatures.

What can be gleaned from this history? One thing, certainly, is that the more the equal rights amendment has been exposed to the light of serious legislative discussion and debate, the less successful it has been.

In those States, particularly some of the early-ratifying States where the debate was perfunctory and limited to statements of commitment in behalf of equal rights for women and an end to second-class citizenship for women, the amendment did well. In those States where there were structured hearings and debates, the amendment did significantly less well. This is certainly not surprising, in my eyes.

To the extent that the proponents of the ERA can fashion this debate in terms of slogans and mottoes, they are likely to prevail, for their slogans and mottoes are good ones. There is an overwhelming consensus in this country, I believe, in behalf of equal opportunity and equal legal treatment for men and women. There is an overwhelming consensus that believes that every individual ought to be free to fully realize his or her potential.

To the extent, however, that the equal rights amendment debate is fashioned in terms of its concrete impact upon 220 million Americans, I do not believe that they are likely to prevail.

The one thing that the ERA cannot withstand, in my opinion, is serious scrutiny as to its effects upon the society in which we live. Now, what do I mean by that? The problem with the ERA, of course, is that no one has the slightest idea of what it really means.

As one of our witnesses today has remarked, "If adopted, the equal rights amendment would be the only provision in the Constitution bestowing or protecting a right without identifying that right."

What is truly remarkable about the debate that has accompanied the ERA over the past dozen years is that it has rarely focused on whether or not what the ERA would achieve is good or bad. Instead, the debate has centered almost exclusively on what the amendment means. This kind of constitutional debate is unique in the constitutional history of the country.

Whatever one thinks about amendments to prohibit abortion or to abolish the Electoral College or to restore school prayer or to establish a 6-year Presidential term, at least it is fairly well understood what these amendments would achieve if ratified; at least we can debate whether these achievements would be beneficial or detrimental to the Nation. This is not true with the ERA; on this amendment there is disagreement even among proponents on the most basic and fundamental effects of the amendment.

While constitutional amendments cannot reasonably anticipate every problem that may arise over time, the ERA does not anticipate even basic problems.

Ladies and gentlemen, I will look forward to the expressions of commitment during these hearings to the principles of equal rights for women. I wish myself to affirm this commitment this morning.

At the same time, however, I will look forward to the statements from our witnesses—those from academia, those from Congress, and those from other walks of life—advising this committee and advising the people of this country what specifically we are doing to the laws and public policies of our country in adopting the equal rights amendment.

Whatever transpires with the equal rights amendment in Congress, I think that it is essential that those on both sides of the debate use the opportunity of these hearings to create a legislative history that will make clear the real-world implications of this amendment to the 50 State legislatures. They and their constituents—our constituents—are entitled to know what the equal rights amendment is intended to do.

What will be the impact of the amendment upon the domestic relations laws of the 50 States? What will be its impact upon labor law and criminal law and education law? What will be its impact upon military policies, on abortion policies, and traditional policies regarding to homosexual relations?

What will be its impact upon the balance of constitutional authority between the Congress and the States, the legislative and the judicial?

It is in the interest of every one of us to create this record, unless it is our desire simply to transfer decisionmaking authority over each of these issues from the accountable elected branches of government to those who are without direct accountability in the judicial branch.

The debate of the past dozen years has been marked by claims and counterclaims of distortion and misrepresentation and exaggeration—on both sides. I believe that such debate has frequently been characterized by more heat than light coming from all sides.

I would look forward in these hearings to addressing in the most thorough and thoughtful manner possible these alleged myths and realities of the equal rights amendment. As with every other set of hearings by this panel, these hearings will be fair and balanced with opportunities for all points of view to be addressed.

No other type of hearing, in my opinion, can do justice to an issue of as immense importance to this Nation as the equal rights amendment. I fervently hope that the hearings that will shortly begin in the House of Representatives will honor these same standards. I hope they will be fair, I hope they will be balanced, I hope they will listen to both sides. I hope they will call the best people they can find on both sides of this issue, as we intend to do. And I think if they will, both Houses will be doing the people of this country a tremendous service.

Justice Felix Frankfurter once remarked that:

> Only those who are ignorant of the nature of the law and regardless of the intricacies of the American Constitution * * * will have the naivete to sum up women's whole position in a meaningless and mischievous phrase about "equal rights."

If nothing else, I am hopeful that these hearings will be successful in imbuing this "meaningless and mischievous" phrase with serious content. Only when this has been achieved can the American people and their elected representatives make a truly informed and intelligent decision about the effect the proposed constitutional amendment will have upon this country.

I look forward to our witnesses this morning helping us take a first step toward this critically important objective. We intend to hold a series of hearings on this subject that I think will be equally as interesting.

We have excellent witnesses today on both sides of this issue and I am looking forward to hearing from them.

Senator DeConcini?

OPENING STATEMENT OF SENATOR DENNIS DeCONCINI

Senator DECONCINI. Mr. Chairman, thank you very much. I am pleased that Chairman Hatch has seen fit to commence hearings on the ERA. Many questions have been raised as to the scope of the amendment, its meaning, and potential impact. Considered discussion of these issues will be most helpful and, I feel, serve a most important purpose.

As always, the chairman has been most gracious in extending truly equal rights to the proponents of the amendment. I look forward to working with you, Senator Hatch, on this issue as we have in the past.

Mr. Chairman, the equal rights amendment is our Nation's most importance piece of unfinished business. It is a 24-word text that is straightforward language. It sets out a basic principle that equal treatment under the law shall not be abridged on account of sex.

I have supported the ERA prior to coming to the Senate and during my Senate term, and I remain committed to seeing that this is passed.

The proposed equal rights amendment to the U.S. Constitution was first introduced in 1923, although it was not passed until 1972. As has been pointed out by the chairman, a 7-year time limit was placed on it. In 1978, the proposed amendment had been approved by 35 States. Unfortunately, no additional States had voted for ratification before the new deadline and the proposed amendment died on June 30, 1982.

It is not really dead. On July 14, 1982, the amendment was reintroduced in Congress, using the form devised in 1972. The amendment was referred to the House and Senate Judiciary Committees, but no further action was taken.

This year, the ERA was reintroduced in the Senate on January 26 as Senate Joint Resolution 10, with 56 cosponsors. It was reintroduced in the House on January 3 as House Joint Resolution 1, with 239 cosponsors.

As I understand, the subcommittee will hold a series of hearings on Senate Joint Resolution 10 extending through the summer and into the fall. The House Judiciary Committee will do likewise, commencing June 8.

A constitutional amendment which guarantees equal rights under the law to all persons regardless of sex is long overdue. I personally find it difficult to understand the controversy that has swirled around this issue. It is a simple matter. In a society of laws, which the United States is, all citizens must have equal standing. Anything less is simply unacceptable.

I fear that too many well-meaning individuals have lost sight of the simple and profound elegance of the proposition and have gone looking for demons and dragons. There are none. The equal rights amendment is what it says—nothing more, nothing less. We all are equal. That is all there is to it.

No one would disagree with the notion that the United States has long been moving toward equality of rights without the ERA. Indeed, great strides have been made. The reason for this is that the entire society is suffused with the concept of equality.

But having said that, we must also acknowledge that there are still great obstacles to overcome. Working women still lack in wage equality with their male counterparts. Divorce, property, and retirement laws still undervalue the worth of a woman's work and services. Thousands of Federal, State, and local statutes treat citizens differently depending on their sex.

Women comprise the vast majority of the poor, and head over one-half of America's impoverished families. Despite title VII of the Civil Rights Act, title IX of the educational amendments, the Equal Pay Act, the Equal Opportunity Act, and numerous other statutes designed to bring equality to women, women still have not been brought into the mainstream as equals.

The time has come to make clear in the governing document of this Nation, the Constitution, that women have earned and deserve equal treatment under the law. The time to act is now. An overwhelming number of Americans—75 percent—support equal rights for women under the law. Today's hearing is the first step in a long path toward passage.

We must renew the fight for the ERA. It is the right fight and we must see it through to its conclusion.

I thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator DeConcini.

Because Senator Grassley has a subcommittee that he must chair, we will turn to Senator Grassley, with Senator Thurmond's permission, at this time.

OPENING STATEMENT OF SENATOR CHARLES E. GRASSLEY

Senator GRASSLEY. I thank you, Mr. Chairman, and I thank the Senator from South Carolina for his cooperation. I have only a short statement because I do have my own subcommittee hearing. I do expect, though, Mr. Chairman, to participate in future hearings on this proposal.

This is the third time in my duties as a legislator that I have had to pass judgment upon this amendment. The first instance was in March 1972 when I joined my colleagues in the Iowa Legislature in voting to ratify the amendment less than 48 hours after its submission to the States by the Congress.

The overwhelming margin of the vote that day in that body was a reflection of what we legislators believed we were voting upon—the simple question of whether we were for or against equal rights for women.

The second time came in 1978 when, as a Member of the U.S. House of Representatives, I was called upon to vote on a resolution to grant an extension to the original 7-year time limit. I voted against that extension, not because of the substantive reasons related to the language of the proposed amendment itself, but rather because I felt that a 10-year period would violate the implicit constitutional requirement that the ratification by the States be reasonably contemporaneous.

In the 11 years that have passed since I first voted to ratify the amendment, much of the focus of discussion has shifted from what the amendment might do for women to what it might do to them. The debate has raged from one end of the country to the other as to what ERA would really mean to women and to our prerogative as legislators to, from time to time, give them preferential treatment, as in the case of draft registration.

As the debate shifted, the steamroller to ratification slowed with a growing list of States actually rescinding earlier ratifications and some States, my own included, defeating State ERA referenda on the ballot by significant margins.

I hope that these hearings will supply the answers to a number of questions which trouble me about the proposed amendment—questions such as, but certainly not limited to, why is there so much disagreement as to the operative impact of the amendment, should it be adopted? How would the rights of women really be improved, in practical terms, by the amendment? Will Congress lose any legislative prerogatives in granting preferential treatment to women? Is it fair to the States to force this amendment upon them when they have already soundly rejected it in two consecutive periods of ratification?

Finally, would passage of the amendment serve as a setback to those of us who have worked hard to restore the right to life to the unborn? I will be particularly interested in Congressman Hyde's testimony on this last point.

Unfortunately, I have to leave to chair my hearing, but I would appreciate the opportunity, Mr. Chairman, to submit questions in writing to any of the witnesses.

Senator HATCH. Thank you, Senator Grassley.

Senator Thurmond?

The CHAIRMAN. Senator Kennedy, I believe, would be next.

Senator HATCH. Well, I am going to go to subcommittee members first and then I will go to Senator Kennedy.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. Mr. Chairman, I want to take this opportunity to commend you for holding this series of hearings on the proposed equal rights amendment. From past experience, I know that under your direction these hearings will provide an open forum for a complete airing of all aspects of this proposal.

This amendment and the issues that it fosters are not new to our society. After 10 years of public discussion, the legislatures and the people of the vast majority of the States have already spoken to this question.

With the revival of this proposal, all of the old issues and many new questions will undoubtedly be brought forth for our consideration. Due to the importance of this amendment, its far-reaching effects, and the fact that it has already been before the States, I will be taking a keen interest in the renewal of the effort to attain passage of this proposed change.

As you know, I was an original cosponsor of the equal rights amendment in 1972. Further, I support the effort to eliminate all vestiges of discrimination against women. I remember when I was teaching school when I first started out, the men in the school received more money than the women. I did not think it was fair then and I do not think it is fair now. I think one of the main things that women want is equal pay for equal work, and they are certainly entitled to it.

The question that is immediately presented is whether section 2 will operate to transfer from the State legislatures to Congress total authority over questions involving equality of the sexes. It is my view that such a transfer would be extremely harmful to our efforts to preserve to the States power over issues such as this which concern the very fabric of our society.

The equal rights amendment in its current form has just ended a 10-year period of public debate and review by the American people. From this long period of consideration, it is clear that there is no consensus as to the meaning of this amendment, and that there are sharp differences of opinion as to its operative effect.

These hearings should focus renewed attention on the many questions surrounding the amendment, thereby helping to ensure that the effects of this proposed change will be consistent with the intention of Congress.

I do think we have got to clarify just what this amendment means. If it can be modified to be absolutely clear what it means and women's rights are protected, then that is one question. But if it is not clear on that point, it is another question.

So, I think these hearings will be very helpful to hear both sides, to hear the finest scholars in the country, to hear the laymen, to hear the women, to hear the men, to hear everybody concerned with this amendment.

We must have equal rights. The only question is how those rights are best attained.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Mr. Chairman.

We are happy to have here with us today an esteemed member of the Judiciary Committee and a friend of all of us, Senator Kennedy. Do you have any remarks?

OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY

Senator KENNEDY. Yes; Thank you very much, Mr. Chairman.

I was somewhat interested in listening to your opening statement, Mr. Chairman, about some of the States that acted early in consideration of the equal rights amendment. Massachusetts was proudly one of those States. We acted within the first several weeks after the ERA passed the Congress of the United States.

And with all due respect Mr. Chairman, we knew exactly what we were passing in Massachusetts; we knew exactly what we were passing. We believed in Massachusetts that women in our society should have just as many rights and should have just as many protections under the Constitution of the United States as men should.

So, I do think we do a disservice when we make rather an elitist argument—and particularly from some of those who are constantly beating the drum on behalf of all the wisdom not being here in Washington but out in the States—we make rather an elitist argument when we suggest that the States themselves did not quite understand what they were doing at the time when they were ratifying this particular amendment. I just want to make it extremely clear that with regard to my State, we had a very clear idea of what we were doing.

Second, I think it is rather interesting to hear at the start of this debate and discussion that we are going to put aside mottoes and slogans, because if we yield to mottoes and slogans, then those who favor the ERA are going to prevail. Well, I hope we do eliminate mottoes and slogans. As one who is a strong supporter of the equal rights amendment, I think the whole argument would be better served, and I hope that that is going to be guidance for those who support it as well as those who are against it.

I hear at the outset about how are we going to pass an amendment when the language is not clear? I wish our former colleagues in the Senate of the United States that passed the 14th amendment with words like "equal protection of the laws"—marvelous specificity in those words; "due process"—marvelous specificity in those words; the privileges and immunities clause could hear the admonitions of the chairman.

I hope the learned members of the Judiciary Committee are going to be able to define with the kind of precision that they expect from those who support the equal rights amendment, those particular words that are enshrined in the Constitution of the United States and which our Supreme Court has interpreted over a period of years.

At least now, after 200 proud years of making choices and decisions, under the Constitution, considerably less with regard to the 14th amendment—I think our Supreme Court has breathed life into those particular words in a way which has eliminated some of the aspects of prejudice and discrimination in our society, but clearly has not done so with regard to women and we meet here to consider how one of the important vestiges of discrimination can be eliminated. And it is with this amendment that I believe it can.

So, I want to thank you, Mr. Chairman, for holding these hearings today, and for at least giving some assurance to the majority members of the U.S. Senate who are cosponsoring this that we will be able to get some action on this amendment. I think that that is extremely important.

I welcome the chance to be here to reaffirm my own strong commitment to making ERA a part of the Constitution and ending the shocking and shameful gender-based discrimination which persists in our Nation.

I was proud to stand with Senator Bayh and other leaders at the forefront of the ERA battle more than a decade ago. And I was proud of the fight that we made for extension of the deadline for the ratification of ERA in 1978. I welcome the opportunity to help guide the ERA through the Judiciary Committee and this Congress.

Equal opportunity for all, which is the cornerstone of our Republic, demands inclusion of the ERA in our Constitution. We must at last recognize the essential contributions of millions of homemakers in America who in the prime of their lives, nurture our future citizens and too often live their golden years in poverty. We can no longer justify denying the 48 million women in our Nation's work force their right to pursue any career and to be paid a fair and equitable wage and a comparable wage for comparable work.

I invite anyone who suggests that we do not need ERA to study the current facts of economic discrimination against women. We are all too familiar with the fact that women earn only 59 cents for every dollar earned by men. Even worse, black women earn only 54 cents, while Hispanic women earn only 49 cents for every dollar earned by white men.

These facts are disturbing on their face, but they become disgraceful when we look at what they mean to American families. There are now 8.2 million families headed by females in this country, and they represent half of all the poor families. If working women who are heads of households were paid comparable wages to men's wages, half of the poor families in the United States would no longer be poor.

As of September 1982, women comprised 43 percent of the total work force. But women are not represented in all occupations in proportion to their numbers. They continue to be concentrated in low-paying jobs which offer little job security and little opportunity for advancement.

While 99 percent of the secretaries in offices across the country are women, only a tiny percent of the business executives supported by secretaries are women. And pay inequity continues to be a national disgrace. I urge those who claim that ERA is unneeded to tell that to registered nurses who earn less than $8 per hour, while their hospitals pay maintenance workers more than $11 per hour.

Although many statutes and executive orders affecting sex discrimination are already on the books, the policies of this administration have reminded us how fragile our fabric of laws really is. We need the protection that only a constitutional amendment can provide to prevent the arbitrary modification of regulations and executive orders that insure equal rights for women. Equal rights are too important to depend on individual policies of each administration.

The ERA continues to enjoy strong, broad-based support. The hundreds of organizations in Massachusetts and across the country who have publicly expressed their support for ERA include groups reflecting the entire range of opinion in America. In the U.S. Congress, a majority of Members in both Houses are cosponsors. Three-quarters of Americans live in States which have ratified ERA.

Opponents of equal rights boasted that the expiration of the time for ratification last year would be the death of ERA. But to paraphrase Mark Twain, the obituaries for ERA were premature. ERA is alive and well in every region of America, and the sooner the

Congress understands that ERA will not go away, the sooner this amendment will take its rightful place in the Constitution.

I am proud to stand with the cosponsors and supporters of Senate Joint Resolution 10 and the 60 percent of Americans who pledged their support for ERA in a national poll last summer. We know that ERA is here to stay.

The failure of ratification the first time around has encouraged women to wield their enormous power at the ballot box. Women actually cast more votes than men in the 1982 elections, and the potential of those votes will be there in every future election in every community in America. Every candidate for public office now understands that when the votes are counted, women count, and our democracy is better for it.

Americans in cities and towns all across our Nation are watching these hearings carefully and they will pay close attention to what is decided here. They will not allow a small number of legislators to frustrate the wishes of the vast majority of citizens.

We have heard opponents of ERA attempt to justify their position by offering anachronistic rhetoric about the need for special protection for women. But the facts belie the solicitousness of these opponents.

Women have fallen through the administration's safety net in record numbers. The $1.2 billion reduction in Aid to Families with Dependent Children and the $757 million reduction in food stamps stripped many women and their families of the only protection they had against abject poverty. And Medicare changes requiring elderly citizens to pay $1,500 more of their medical bills before they become eligible for governmental assistance threaten to put essential medical care out of reach for half of the older women in America.

What protections do the opponents of equality offer to a working woman who is denied her pension because she interrupted her career to bear a child and did not work at the same job long enough to become vested in a plan?

The most important protection we can provide for women, and the beginning of all other protections, is the protection of the Constitution. It is time for Congress to adopt the equal rights amendment, and this time we will not rest until ERA is ratified by the States and becomes the 27th amendment to the Constitution.

Finally, Mr. Chairman, I want to give a very special welcome to my colleague, the Senator from Massachusetts, Senator Tsongas, who is the principal sponsor, and again reaffirm, I know, his strong and continuing commitment to this proposal, and indicate how welcome he is to this committee this morning.

We welcome his statements and his comments as the leader and spearhead of this movement.

Senator Hatch. Before I call our first witness I wish to place the prepared statement of Senator Biden and a copy of Senate Joint Resolution 10 in the record.

[Material follows:]

PREPARED STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

For over 60 years, since it was first introduced in Congress the Equal Rights Amendment has represented the greatest of all American ideals: Equal justice under law. But the American people are not satisfied with symbols, and by a large majority insist that we make the ERA a living embodiment of that ideal by enshrining it in our Constitution.

I look forward to taking part in this effort.

It is simply not sufficient to claim that existing laws provide equal protection to the sexes. Many laws actually embody sex discrimination and even a law which is completely sex-neutral can be repealed at any time. Equal treatment under law must not be subject to the whim and caprice of some legislative body acting to satisfy some temporary popular sentiment.

Nor is it enough to claim that the Constitution already provides sufficient protection against sex discrimination.

Remember, it took half a century following passage of the 14th Amendment for women to gain one of the most basic American rights of all: the right to vote. Remember, too, that for many years after the 14th Amendment was ratified, many states still prohibited women from owning property and from holding certain jobs. The history of the 14th Amendment with regard to equal protection of the sexes is, at best, uneven.

The American people have demanded action on this issue. Let us listen to the people and take that action.

II

98TH CONGRESS
1ST SESSION

S. J. RES. 10

Proposing an amendment to the Constitution of the United States relative to equal rights for women and men.

IN THE SENATE OF THE UNITED STATES

JANUARY 26 (legislative day, JANUARY 25), 1983

Mr. TSONGAS (for himself, Mr. PACKWOOD, Mr. KENNEDY, Mr. MATHIAS, Mr. BYRD, Mr. BIDEN, Mr. LEAHY, Mr. DECONCINI, Mr. METZENBAUM, Mr. BAUCUS, Mr. SARBANES, Mr. SPECTER, Mr. DODD, Mr. WEICKER, Mrs. KASSEBAUM, Mr. RANDOLPH, Mr. PERCY, Mr. DURENBERGER, Mr. HATFIELD, Mr. PROXMIRE, Mr. MOYNIHAN, Mr. COHEN, Mr. PELL, Mr. BRADLEY, Mr. CRANSTON, Mr. DANFORTH, Mr. STEVENS, Mr. HEINZ, Mr. EAGLETON, Mr. GLENN, Mr. GORTON, Mr. HART, Mr. HOLLINGS, Mr. INOUYE, Mr. JACKSON, Mr. LEVIN, Mr. MELCHER, Mr. RIEGLE, Mr. BENTSEN, Mr. ROTH, Mr. HUDDLESTON, Mr. BOREN, Mr. DIXON, Mr. BUMPERS, Mr. MATSUNAGA, Mr. MITCHELL, Mr. MURKOWSKI, Mr. ANDREWS, Mr. STAFFORD, Mr. CHAFEE, Mr. BURDICK, Mr. BOSCHWITZ, Mr. BINGAMAN, Mr. LAUTENBERG, and Mr. JOHNSTON) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

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JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relative to equal rights for women and men.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

"SECTION 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

"SECTION 3. This amendment shall take effect two years after the date of ratification.".

Senator HATCH. Our first witness for today will be the distinguished Senator from Massachusetts, Paul Tsongas. That is not to say that the other Senator is not distinguished, also. [Laughter.]

Senator Tsongas, we will have you as our first witness. Senator Tsongas is the chief Senate sponsor of Senate Joint Resolution 10, the proposed equal rights amendment.

So, we will be happy to hear your viewpoint, Senator Tsongas. I will have a few questions for you. Go ahead.

STATEMENT OF HON. PAUL E. TSONGAS, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator TSONGAS. Thank you, Mr. Chairman. Senator Packwood had hoped to be here, but he was called away to Oregon.

Senator HATCH. I understand.

Senator TSONGAS. He is the other cosponsor of the bill and I would like to express his support as well.

I have a statement here which has been covered by all the opening statements of my colleagues, so I will submit that for the record.

Senator HATCH. Without objection, we will put your complete statement in the record.

[The prepared statement follows:]

Prepared Statement of Senator Paul E. Tsongas

Mr. Chairman, thank you for calling this hearing and inviting me here today to speak about what I believe is one of the most important matters before the Congress. The Equal Rights Amendment has been deliberated in the Senate long before any of us arrived here. It is before this Subcommittee this morning because Senator Packwood and I and fifty-five of our colleagues believe its passage is necessary to serve equal justice for all American citizens.

The Senate cosponsors are not alone in that conviction. The ERA is overwhelmingly favored by the people of this country. Public opinion polls say that a clear majority of Americans support it. When last before the Congress, it won a decisive majority:

-84 members of the Senate and 354 House members of the 92nd Congress voted for its passage (Oct. 12, 1971; March 22, 1972);

-35 states ratified the ERA between 1972-1982,

-and today, the fifty-seven Senate cosponsors join two hundred and thirty-nine members of the House of Representatives in a companion undertaking.

The ERA narrowly failed to win inclusion in the Constitution when the deadline for ratification expired last July. That does not make it unique in our history. The abolition of slavery, the unquestioned right of women to vote in political elections, the extension of suffrage to eighteen year olds, the removal of the poll tax --- all these were sought many years before they won incorporation. That these efforts were successful derives ultimately from the correctness of their aims and from the refusal of their advocates to concede defeat after early setbacks. I would hope, Mr. Chairman, that this is the last time we meet in these circumstances--because the ERA will this time succeed. But if, unhappily that does not turn out the case, I suspect we will be seeing each other again.

The need for an Equal Rights Amendment remains in my judgement a clear and compelling one. It would, for the first time, grant women full status as equal citizens under the Constitution and establish a standard for eliminating discrimination based on sex. Only a constitutional amendment can adequately assure equal rights to the women and men of this nation. It is the only insurance that women will have fair and equal opportunities in employment, education, benefit and retirement plans, marriage and divorce.

Many of the opponents of ERA protest that their disagreement is based on tactics, not principle. They claim to favor a statutory approach rather than a Constitutional one. I do not wish to question their motives, Mr. Chairman, but one has to wonder about the genuine sincerity of those who say that they support thousands of individual, unconnected protections, but not a single overriding guarantee.

A statute-by-statute approach to ending sex discrimination has not worked at either the Federal or state level. The Equal Pay Act has not changed the fact that working women still earn only 60¢ for every dollar paid to men, the same ratio that existed a quarter century ago. Title 1X of the Education Amendments has not altered the course set for female students, often steering them away from the education that could pierce the barrier to better paying jobs. Title V11 of the Civil Rights Act has not eliminated over 800 sections of what the U.S. Civil Rights Commission has identified as federal laws which set sex biased standards.

Since its first introduction, controversy over the ERA has revolved around the same questions: Whether there should be room in the law for 'reasonable' distinctions in the treatment of men and women; whether a constitutional amendment is the proper vehicle for improving the legal status of women; how ERA might affect such areas as privacy. military service, domestic relations, criminal law, employment, education and others. Let me take a moment to address some of these issues.

ECONOMIC EQUITY

According to the U.S. Department of Labor, more women are working than ever before. Fifty-two percent are in the job force compared to thirty-nine percent in 1965. This figure will jump to an estimated sixty-five percent by 1995. Yet women with a college degree earn less on average than a man with an eighth grade education. And while women account for more than forty percent of all white collar jobs, they hold only one in ten managerial positions, and one in seven professional jobs.

Despite the passage of equal credit laws, many women are still denied credit because of their sex.

Despite the significant contribution to the home and family, many homemakers have no legal or economic status and little or no protection upon retirement or disability. In many states, support laws, property laws, divorce laws and inheritance laws discriminate against the homemaker.

EFFECT OF THE EQUAL RIGHTS AMENDMENT

The ERA would have the effect of requiring the government to treat females and males equally as citizens and individuals under the law. It would not require that any level of government establish quotas for women or men in any of its activities; rather, it would simply prohibit discrimination on the basis of a person's sex. The Amendment would apply only to governmental action; it would not affect private action or the purely social relationships between women and men.

The adoption of the ERA would result in the elimination of the use of sex as the sole factor in determining, for example, who would be subject to the military draft, if it were reinstated; who in a divorce action would be awarded custody of a child; who would have responsibility for family support; or who would be subject to jury duty. Moreover, public schools could not require higher admission standards for persons of one sex than the other, and courts could not impose longer jail sentences on convicted offenders of one sex. In essence, the Amendment would eliminate from the law sex-based classifications that specifically deny equality of rights or violate the principle of nondiscrimination with regard to sex.

Questions have been raised regarding the effects of the ERA in the areas of privacy, military service, marriage and the family, protective labor laws, and criminal laws relating to sexual offenders. Let me speak to these concerns.

RIGHT OF PRIVACY

Opponents of the ERA have expressed concern that, with the adoption of the ERA, separate restrooms, prisons, and dormitories for males and females would be prohibited. However, the legislative history of the Amendment and the adoption by 16 states of state equal rights amendments discount these concerns. The 1972 report of the Senate Judiciary Committee states that two legal principles are especially significant in this regard:

> One principle involves the traditional power of the State to regulate cohabitation and sexual activity by unmarried persons. This principle would permit the State to require segregation of the sexes for these regulatory purposes with respect to such facilities as sleeping quarters at coeducational colleges, prison dormitories, and military barracks.
>
> Another collateral legal principle flows from the constitutional right of privacy established by the Supreme Court in Griswold v. Connecticut, 381 U.S. 479 (1965). This right would likewise permit a separation of the sexes with respect to such places as public toilets, as well as sleeping quarters of public institutions.

Put simply, the state's traditional regulatory powers and the constitutional right of privacy would permit a serparation of the sexes with respect to public restrooms, sleeping quarters in public institutions, and prisons.

MILITARY SERVICE

A critical question concerning the ERA relates to women and military service. As I view the Amendment, women would be allowed to volunteer for military service, including combat duty, on the same basis as men. But this duty would not be arbitrary. Women would not have to serve in any capacity to which they were not fit just as men are not required to serve where they are not fit.

The ERA would require Congress to treat women and men equally with respect to the draft, if a draft were reinstated. This would mean that both women and men who met physical and other requirements, and who are not exempt or deferred by the law, would be subject to conscription.

It is important to note what will not be required by the ERA. ERA will not require that all women must serve in the military any more than all men must serve. Women who are conscientious objectors, who are unqualified for medical reasons, who have dependents, or who are mothers with children would not automatically be subject to the draft any more than men with particular exemptions would be.

In its effect the ERA would mean a more efficient and capable military. Further, women in the military and as veterans would receive the same benefits.

DOMESTIC RELATIONS

The ERA would affect state domestic relations laws that make distinctions based on sex. For example, the Amendment would bar a state from imposing a greater liability on one spouse than on the other merely because of sex. Child support required of each spouse would be defined in terms of functions based, for example, on each spouse's earning power, current resources and nonmonetary contributions to the family welfare. Divorce laws would have to be sex-neutral so that factors other than gender would determine the payment of alimony and the custody of children.

And contrary to the fears raised by opponents of ERA, the ERA would not destroy the family. It would not force women out of the home or downgrade the roles of mother and homemaker. On the contrary, the status of the homemaker would be strengthened. The Amendment would guarantee a "partnership" in which marital property belongs to both husband and wife. And it would ensure that outdated laws which discriminate against women be deleted from federal and state codes.

LABOR LEGISLATION

Many states have labor laws which bar women, whether qualified or not, from certain jobs -- jobs which are open to men. Other states have weight-lifting laws applicable only to women. Still others have laws limiting the hours women can work. Title VII of the Civil Rights Act prohibits sex discrimination in employment in certain instances where sex is not a "bona fide occupational qualification." Court decisions have invalidated many state laws based on Title VII which prohibit or limit employment of women in certain occupations. But many state laws of this kind are still on the books.

Ratification of the ERA would result in equal treatment for women and men with respect to state labor laws. State statutes which bar women entirely from certain occupations would be invalid. However, laws which offer a real benefit could be extended to protect both women and men. For example, the ERA would ensure that laws providing rest periods for workers or minimum wage benefits or health and safety protections would cover both sexes.

CRIMINAL LAW

As for the criminal law, the Amendment would prohibit a state from providing for different punishments for women and men who commit the same crime. Laws which are limited to one sex would have to be extended to both, or such laws would become invalid. For example, many prostitution laws make only the acts of women criminal and not those of men. Under the ERA, these laws could be extended to cover both prostitutes and patrons.

But more important than the statistics and the categorical arguments that I have just enumerated, there is a personal reason that leads me to feel so strongly about this issue. I have three young daughters, aged two through nine. By the time they are finishing their educations I would hope that the situation I just described has changed and that their opportunities are just as limitless as those of their male contemporaries. I would feel far more confident of that outcome if the amendment before this committee has become part of the fundamental law of the land.

Senator TSONGAS. I would like to begin by acknowledging the work that Senator Kennedy and Senator Bayh did in bringing this issue to the forefront in the previous reincarnation. It was my hope, and that of the majority of this country, that that would have settled the issue. It did not, and here we are back again.

I must say, Mr. Chairman, that there is something unseemly about the male Members of this body saying to the women of this country, "We know what is best for you and we are going to save you by killing the ERA, and thereby make you free."

Senator HATCH. That might apply both ways, Senator.

Senator TSONGAS. I think the only response to this kind of approach is to simply say thanks, but no thanks. This issue is going to triumph, and I think it is in our interests that we resolve it here once and for all and put the issue behind us.

To bring up, in essence, 19th century arguments to kill off a 20th century idea, I do not think is worthy of this particular body. History does not treat well those who stand at the courthouse door. They are remembered by history as not part of the hope and solution of America, but part of the fear and the darkness that reside in all of us.

This is a great committee and the members of this committee are very distinguished. I suggest that we all join together and pass the ERA. Let us not spill blood over this issue. Let us join together and heal what I think is an unnecessary rift between us, which will enable us to go on to the other great issues that face this country.

I have two other final points. One is that one of the effects of the nonratification of the ERA ironically has been to bring women into the political process. They have now understood that you cannot leave it to their male fellow citizens to do what is right; that they have to have their hands on the levers of power.

I think, long term, that the nonratification of the ERA is going to bring women into the political process and you are going to hear from them not only on this issue, but human rights, the social programs, education—the whole range of issues before our Nation.

Those who were able to defeat the ratification will, I think, in time regret having succeeded.

The final point: somewhat more personally, Mr. Chairman, I have three children. They happen not to be male; they happen to be female. I have three daughters between the ages of 1 and 9. What am I supposed to tell them, that we brought them into this world and that they are somehow different and less worthy than if they had been born male?

The nonratification of the ERA tells them that, and I must say that I will do all that I can to make sure that the children we bring into this world have the same rights that they would have had had they been born male. That is not a great deal to ask, and I would hope that this body would reflect the feelings of the American people and the majority of our colleagues and finally do what is right and get the issue behind us so we can all go home and look at our children who happen to be female and say we now have equality in the truest sense of that term.

That would be worthy of the U.S. Senate, and I would hope we could join together in that endeavor. I thank the chairman.

Senator HATCH. Thank you, Senator Tsongas. Let me just ask you a few questions that I think are important. I might add that as the chief sponsor of the Senate version of the equal rights amendment, I think your particular viewpoint would be most helpful in clarifying the legislative history.

As you know, the principal controversies that have surrounded the amendment over the past decade have been controversies over its legislative impact. So that all of us can have a better understanding of the intentions of the chief sponsors of the ERA, let me just ask you a few questions about what legislative changes will be required if the amendment becomes part of the Constitution.

But before I get to those questions, I would like to ask you two questions that I think are very important. What precisely, in your view, is the standard of review that the equal rights amendment would establish for Federal and State legislation that employ sex classifications?

Senator TSONGAS. It seems to me, Mr. Chairman, that what we have on this issue is the same standard of review you have had on every other amendment that has passed the Congress. Senator Kennedy referred to some of the ambiguities in other amendments which have passed.

There is no one who would argue that we have at this point an exact understanding of where it will lead. There has never been an exact understanding on any of the things which have passed.

To somehow suggest that the lack of that kind of specificity is grounds for rejecting the amendment, I think, is an interesting tack, but I would suggest to you that there is no precedent in our history for laws coming out with that kind of exactitude. And I would suggest it is not going to be the case here; it will not be the case on other issues in the future. And I would hope that we would not hang our arguments against the ERA on that particular case.

Senator HATCH. Well, this is not a trivial question. This is probably the single most important question involved in the ERA. It is an important legal question. Maybe I can clarify it a little bit.

Would the ERA equate the standards of review for sex classifications and race classifications? Would such legislation be judged by identical standards? That is very important. Indeed, would the equal rights amendment elevate sex classification above the race, national origin, and religion suspect classifications that presently exist in constitutional law by employing some form of more absolute prohibition?

Senator TSONGAS. Why does not the chairman give me an example of where the conflict would arise?

Senator HATCH. Right now, we have basically three suspect classifications. Religion, race, and national origin. Virtually all laws that classify on these grounds are stricken.

Now, would sex classification be interpreted in the same manner as these other three classifications?

Senator TSONGAS. If I could repeat my question, if you would give me a for instance in which this would be adjudicated——

Senator HATCH. I will do that. I think I will ask you a number of questions, then, that will be "for instances."

Let me just go to a second question that is extremely important. During the initial debates on the ERA, both the chief House sponsor, Representative Martha Griffiths, and the chief Senate sponsor, my predecessor as chairman of this subcommittee, Senator Bayh, stated that the definitive work in understanding the meaning of the equal rights amendment was the Yale Law Journal article in 1971 by Professor Emerson.

Would you agree with Senator Bayh and Congresswoman Griffiths' endorsement of this particular article as the definitive statement on the meaning of the equal rights amendment?

Senator TSONGAS. Having been a graduate of the Yale Law School, I was not compelled to read the journal. [Laughter.]

I would not suggest that I have read that, and I would be glad to go back and read what some of my classmates have written and submit that for the record. But I have [illegible] read that article and if you want me to review it and comment on it, I will.

Senator HATCH. Let me give you some specific illustrations of the important questions that arise with regard to the equal rights amendment. Let me just take veterans preference as an initial illustration.

Judith Lichtman of the Women's Legal Defense Fund was scheduled to testify before this committee today until she canceled her appearance late last week. Now, Ms. Lichtman was the chief litigator several years ago in a case before the Supreme Court in which the defense fund argued that veterans' preference programs, by which veterans are given slight hiring preference in civil service positions, were in violation of the Constitution because more men than women are veterans.

In the decision of *Massachusetts* v. *Feeney*, as you probably know, the Supreme Court rejected this argument. A number of commentators on the equal rights amendment have stated that veterans' preference programs would be made unconstitutional under the equal rights amendment.

Would you agree with that?

Senator TSONGAS. Well, when we get to the point where women are part of the military, the issue will be moot.

Senator HATCH. Well, do you agree or do you not agree with that?

Senator TSONGAS. Well, I do not think that that is for you or I to say. I mean, we have what is called the Supreme Court, which is in a position to resolve those particular matters.

Senator HATCH. So you are saying that matter will be resolved by the court system, then?

Senator TSONGAS. That is very much what would happen, for example, if you passed an amendment on abortion. I suspect the Court would be very involved in adjudicating the particular details, as you would here as well.

Senator HATCH. Barbara Brown, the author of the "Women's Rights in Law" case book and coauthor of the Yale Law Journal article, is one of the leading proponents of the ERA, and certainly one of the leading authorities on this issue. She has stated that a rule giving veterans preference over all qualified women applicants for State employment is unacceptable under the ERA.

Do you agree with that?

Senator TSONGAS. Again, I am telling you, Mr. Chairman, that that is a matter which is going to be decided in the courts. If this amendment is to pass, you will have it in the courts.

Is the chairman suggesting that the irresolution of that issue is enough to not have the amendment pass?

Senator HATCH. I am suggesting that nobody has denied that the issue of the standard of review for a constitutional amendment of this magnitude is a very serious issue.

Let me go to another. Let us take the issue of abortion.

Senator TSONGAS. If I may respond——

Senator HATCH. Sure.

Senator TSONGAS. You are going to be having hearings subsequently this morning on the human life amendment. Is the chairman suggesting that all of the constitutional issues are resolved in that matter; that there will be no interpretation by the courts?

Senator HATCH. No, I am not suggesting that.

Senator TSONGAS. Well, it works both ways.

Senator HATCH. I am asking you as the principal sponsor to tell us what the amendment means. Let me give you another illustration.

You mentioned the issue of abortion. As you know, one of the major controversies about the equal rights amendment has been its relationship to the issue of abortion. A number of individuals have suggested that the equal rights amendment, for example, might lead to the so-called Hyde amendment, which limits public funding for abortion, being rendered unconstitutional.

Indeed, it is my understanding that the State equal rights amendment in your own State of Massachusetts has served as a basis for that argument. In addition, Professor Emerson has written, again, that the ERA "would have an important effect in strengthening abortion rights for women."

Now, what would be your view on the impact of ERA upon the Federal, State, and local limitations on public funding of abortions? Would such limitations continue to be constitutional or, in your opinion, would they be unconstitutional?

Senator TSONGAS. I can give you a personal view.

Senator HATCH. Sure. Well, that is all I am asking. Whatever you think, as chief sponsor of the equal rights amendments, it will stand for. That is all I am asking.

Senator TSONGAS. I happen to believe that the Supreme Court was correct in the decision of *Roe* v. *Wade,* in that the issue of abortion is a matter between a woman and her physician. I think if you pursue that, that is a decree by the Supreme Court.

There have been matters adjudicated in terms of State legislative actions, and I do not see that that is changed by the ERA passing.

Senator HATCH. So you feel that it would overrule the Hyde amendment prohibiting Federal funding of abortion?

Senator TSONGAS. I am telling you, Mr. Chairman, as I said before, that that issue would be resolved in the courts.

Senator HATCH. Let me give you another illustration. A controversy relating to the ERA concerns its impact upon private colleges or schools which are "women only" or "men only." There are, of course, many such institutions across the country.

Now, I would be interested in knowing the impact of the equal rights amendment upon such institutions. For instance, the California Commission on the Effects of the Equal Rights Amendment has said that after the effective date of the ERA, "litigation attempting to place private educational institutions under the ERA is virtually certain to ensue."

Other pro-ERA commentators have said that at the very least, the ERA will make it unconstitutional for governments to provide any of these institutions with financial subsidies, tax-exempt status, or financial assistance for their students.

Now, would you agree with any of these assessments on the impact of the equal rights amendment? Would it be unconstitutional, for example, for governments to provide tax-exempt status for such institutions? Would it be unconstitutional for them to provide individual scholarships or other public assistance to students attending those private colleges or schools?

Senator TSONGAS. Again, Mr. Chairman, I will give you my personal view.

Senator HATCH. That is all I can ask for.

Senator TSONGAS. It would not. I happen to feel that there is no inherent problem in colleges that want to be all male or all female. As you know, there is a movement back in that direction.

But I repeat that these issues are going to be decided in the courts.

Senator HATCH. Would you agree, then, that the ERA would certainly outlaw single-sex public schools and universities? Would you agree with that?

Senator TSONGAS. That it would outlaw single-sex——

Senator HATCH. Public schools and universities.

Senator TSONGAS. I do not know. I mean, I can see the arguments that would be made, and again you would have this resolved in the courts.

Senator HATCH. Let me give you another issue that is extremely important, and I think your views on it are extremely important.

There are many churches in this country which deny various rights to women in the exercise of their religious doctrine. The Roman Catholic Church, for instance, denies priesthood to women. The Mormon Church limits certain positions to men. The orthodox Jewish synagogue segregates men and women.

Now, in your opinion, would the equal rights amendment allow such churches to continue to have tax exemptions and other public benefits?

Senator TSONGAS. In that case, Mr. Chairman, I believe that the issues of the ERA and the issues of freedom of religion are in some conflict. What would happen in that case is they would go to the courts and have it resolved.

Senator HATCH. So you are saying that, again, the courts would have to resolve this issue?

Senator TSONGAS. As they would a lot of the issues that will be raised if the human life amendment should pass as well.

Senator HATCH. How does this issue differ from the treatment of the fundamentalist religion involved in the *Bob Jones* case where the Government was successful in denying tax exemptions to Bob

Jones University, a private, church-related institution which discriminates in its practices with respect to whites and blacks?

The Government argued in that case that tax exemption ought to be denied because Bob Jones, whatever its religious doctrine, was violating an important public policy—the equal treatment of the races.

How does the Bob Jones situation differ from the situation of the orthodox Jewish school which segregates children on the basis of sex for certain classes?

Senator Tsongas. Mr. Chairman, to follow the rationale through, the fact that the Bob Jones issue had to be resolved by the Supreme Court would, to follow the argument, take you back to the position where you would never pass an amendment providing racial equality.

I do not know whether the Chairman is suggesting that, but I would hope that that is not the case. If you are suggesting that wherever there are unresolved issues to be litigated, issues of equality should not be passed, be they race, religion, or whatever, that is a very different situation.

Senator Hatch. I am beginning to wonder what is a resolved issue. Is not the equality of sexes under the equal rights amendment as important and as fundamental as equality in race, equality in national origin, and equality in religion?

Senator Tsongas. I do not think anyone argues that case.

Senator Hatch. Let me follow up on that. The National Organization for Women, the NOW organization, has approved an official resolution which states on this issue

> Resolved, (1) that churches and seminaries immediately stop their sexist doctrines that assign a different role to men and women; (2) that seminaries recruit, enroll, financially aid, employ, and promote women theologians and theological students on an equal basis with men; (3) that federal statutes be amended and enforced to deprive churches of their right to discriminate on the basis of sex; and, (4) that tax exemption be withdrawn from any church activity opposed to abortion or ordaining women to the ministry.

Now, would you agree or disagree with NOW that the assigning of a different role in churches and seminaries to men and women is sexist? Would the ERA, as you have proposed it, tolerate government accommodation of these types of policies?

Senator Tsongas. Again, Mr. Chairman, you have an interpretation of the freedom of religion conflicting with the interpretation of the equality by sex. You are in exactly the same situation that you would have if you have a conflict between freedom of religion and racial equality.

If you are arguing that the ERA should not pass because these issues are unresolved, you have to continue the argument to the point of arguing for removing the racial equality amendment because there are issues there that have gone to court.

If you go down the first road, Mr. Chairman, you have got to continue down that road to wherever that will take you.

Senator Hatch. The reason that I am raising these issues, Senator Tsongas, is because they are very important issues.

Senator Tsongas. I am not arguing with that.

Senator Hatch. You have major organizations saying that this is the way the equal rights amendment has to be interpreted. And, frankly, your answers thus far have been that the courts are going to determine what it means.

I think we ought to determine some of these things in the Congress of the United States because we are elected to determine them rather than leave them all to unelected judges who are not accountable.

But be that as it may, I am concerned, as a person who believes in the first amendment freedom of religion, that if ERA is passed and a standard of review equal to or higher than those relating to suspect classifications for race, national origin and religion, some of these interpretations are going to come down exactly as NOW desires.

That would mean Government imposition of its viewpoint on the Catholic Church, the Mormon Church, the Jewish orthodox faith, and countless other religions in this country unless they were willing to lose their tax-exempt status.

I might add that the courts determine unanticipated conflicts. That is the purpose of the courts. But we are now discussing fully anticipated conflicts and controversies.

Let me give you another question. This is one that is very——

Senator Tsongas. Could I respond to that?

Senator Hatch. Excuse me. Go ahead.

Senator Tsongas. Mr. Chairman, it seems to me that if one is concerned—and I understand the legitimacy of that concern—that there be a more definitive view of what we are passing, it seems to me that the best way of doing it is let us work together; let us pass the amendment. Let us work together in terms of the legislative history and what the intent of the Congress and the Senate would be, as opposed to what is happening, because we have those who are in favor and those who are opposed who are now going to engage in legalistic arguments as to why it should not pass.

It seems to me that if we were to work together in this particular matter, I think some of these issues will be resolved. Some will not be resolved and will have to go to the courts.

But I would only reiterate that if that argument is sufficient to knock off the ERA, then there is an obligation on those who do that to go back to all the other amendments which have been passed which have also caused legislative ambiguities and have led to court cases, and you will viscerate the entire U.S. Constitution. And I would suggest that nobody is in the mood to do that.

Senator [illegible]. The difference is there will always be unanticipated conflicts and uncertainties in any constitutional amendment.

These, however, are fully anticipated conflicts; these are uncertainties that I think have been discussed and considered by proponents of the equal rights amendment. I think proponents of the ERA ought to state clearly which way they think this amendment will be applied, because once the amendment is ratified, assuming that it is, it will then be too late to make these determinations.

I might add that it will then be virtually impossible to change them legislatively. These issues will be "constitutionalized."

Senator Tsongas. Mr. Chairman, if I were to give you examples of anticipated conflicts with the human life amendment, would you withdraw it?

Senator **Hatch**. That is not what is before us right now. [Laughter.]

You are the sponsor of the equal rights amendment. These are not difficult questions; these are questions that have been discussed during the past 12 years. These are questions that concern the basic premises that will apply to this amendment.

These are anticipated problems; they are serious problems. The *Bob Jones* case raises these religious problems anew.

But if you start talking about the Catholic Bishops Conference, rather than Bob Jones University, worrying about whether or not they are going to be able to retain their tax-exempt status because they are not giving the priesthood to women, that is a concern to a great many persons.

I will give you another illustration.

Senator **Tsongas**. Mr. Chairman, could I respond?

Senator **Hatch**. Yes, sure.

Senator **Tsongas**. Do you believe that when the racial equality laws and amendments were passed, anyone knew of Bob Jones University and the court case that would follow?

Senator **Hatch**. I believe that there may have been some who were concerned, but that is not the issue here today.

Let me give you an illustration.

Senator **Tsongas**. If I could just respond——

Senator **Hatch**. Sure.

Senator **Tsongas**. I will make an offer to you, Mr. Chairman.

Senator **Hatch**. Go ahead.

Senator **Tsongas**. If I can demonstrate to you anticipated problems in the human life amendment, and because of that and the case you have been arguing here, you take your name off that amendment, I will take my name off the ERA amendment.

Senator **Hatch**. Currently, the courts are deciding all issues bearing on the right to life controversy. My amendment's purpose is to provide people in State legislatures a role in the decisionmaking process relative to the issue of abortion.

Senator **Tsongas**. Can you commit that there will be no anticipated problems if your amendment passes?

Senator **Hatch**. Well, I think there will always be problems. That is not the point. The point is, what does the equal rights amendment mean with regard to anticipated problems.

I would be willing to testify on the human life amendment in response to questions on anticipated problems. I would not keep saying, that the courts ought to decide that.

My particular amendment on that issue will take the issues now decided in the courts and return them to the representative branches of government.

If the equal rights amendment is passed, you are saying it will be exactly the opposite. The representative branch, the elected branch, will not be able to resolve these issues because it will be locked into the Constitution. That is the difference.

Let me ask you another question.

The Commission on Civil Rights has also observed that the equal rights amendment "will prohibit sex-based discrimination in insurance wherever Governmental action is involved." Now, given the degree of government regulation of the insurance industry, some people would say that the equal rights amendment would flatly prohibit sex-based discrimination in insurance policies and actuarial tables.

That is despite the fact that men and women, on the average, have different life expectancies. They would pay identical amounts for annuities and pensions, and despite differences in accident records, they would pay identical amounts for automobile and casualty insurance policies.

Let me just ask you this: Would there be any impact upon sex-based insurance policies as a result of the equal rights amendment, in your opinion?

Senator TSONGAS. Mr. Chairman, if we pass this amendment, the issue will end up in court. Mr. Chairman, if we do not pass the amendment, this issue will end up in court.

Senator HATCH. Well, I would much rather be able to legislatively resolve it if the court does not resolve it favorably. And I think if the court came down against your position, you might want to resolve it legislatively. Once it is locked into the Constitution, you will not be able to do it.

Senator TSONGAS. Can the Chairman give me an example of an amendment which has passed in which there were no court cases subsequently?

Senator HATCH. Well, I agree with you that unanticipated problems come to court. We are talking about anticipated problems; we are talking about problems that exist, that are concrete and cannot be ignored.

We are talking about the Constitution of the United States. We are talking about standards of review that could turn this country upside down.

I do not think that the majority of the people in this country are willing to turn everything over to the Supreme Court of the United States, or over to the Federal judiciary in general.

But be that as it may, let me ask you about——

Senator TSONGAS. Mr. Chairman, if I may respond——

Senator HATCH. Sure.

Senator TSONGAS. We passed the MX missile yesterday.

Senator HATCH. Right.

Senator TSONGAS. There are a lot of anticipated problems in that field. It did not stop us from voting.

Senator HATCH. And we can repeal that immediately because it is a statute. But once you pass a constitutional amendment, it is pretty tough to repeal it. That is the difference.

Senator TSONGAS. I will join you in the repeal.

Senator HATCH. I understand that. [Laughter.]

But at least we could join together if we wanted to as Members of the Congress and as elected representatives. If the equal riqhts amendment passes, all these anticipated problems are relegated to the courts. They may not come down the way you or I would like. But that is when they will be decided.

Legislative bodies change, but they change in response to the will of the people; courts do not.

Let me ask you about fair housing. It is another very current issue. Barbara Brown, one of the leading academic authorities on the equal rights amendment, has stated that the equal rights amendment would likely require that discrimination on the basis of marital status be added to the housing discrimination laws of the Nation because a large majority of single-parent families are female-headed.

Would the ERA require the fair housing laws of the country to prohibit, as a new category of discrimination, discrimination against married or single persons?

Senator TSONGAS. I do not believe that it would, Mr. Chairman. But, again, you are talking about an issue that may or may not end up in the courts.

You know, I appreciate the chairman's position and his concern. I also have respect for the tact that the Chairman is using very skillfully. But, ultimately, what you are saying is this: If you have anticipated problems, nothing should pass into the Constitution.

Senator HATCH. No, that is not what I am saying. I am saying that we ought to at least resolve these problems in advance so we know where we are going as a nation; we ought to do it in the interests of the people of this country before the ERA is ratified.

I am not saying that anything that has problems ought not go into the Constitution. But I think we ought to attempt to resolve them; we should not just say let the courts resolve them.

Senator TSONGAS. Well, how many of these issues, if they were resolved, would cause you to sign up with the ERA amendment?

Senator HATCH. A number of them. Especially the standard of review issue. But I do not think you are resolving them for me here today.

Senator TSONGAS. Why do we not do this? Why do you not give me a list of all the concerns that you have? I will sit down with Senator Packwood and we will give you answers to all of them and resolve them in terms of the intent of the sponsors.

Senator HATCH. I am willing to do that, but let me make the record today because this is an important record and you are the principal sponsor.

Senator TSONGAS. We will be pleased to have you sign on to the ERA amendment.

Senator HATCH. I understand, and nothing would please me more if we can resolve some of these conflicts.

The Yale Law Journal article has suggested that if a company has a leave time policy for pregnant women or new mothers, they would have to adopt an equivalent leave time policy for the husbands of pregnant women or new fathers.

Now, would you agree that the ERA would prohibit granting leave time only to the female parent of a child?

Senator TSONGAS. Well, I think it should be expanded to provide leave time for all pregnant men, were that to occur. [Laughter.]

Senator HATCH. Well, that is a humorous answer, but it does not answer my question.

Do you think men have to be given leave time, as the Yale Law Journal says and as Senator Bayh indicated when he was the chairman of this subcommittee?

Senator TSONGAS. It is my feeling personally that they would not. But, again, that does not solve the problem.

Senator **Hatch**. Again, it would have to be resolved by the courts, you are saying? You would disagree with Professor Emerson, the author of the Yale Law Journal article?

Senator **Tsongas**. There are 220 million Americans. What is to stop anybody from going to court if they have a disagreement with any part of any amendment?

Senator **Hatch**. Senator, I am not trying to embarrass you. I am trying to go over some of these issues because they are important ones and it is important to find out what your viewpoints are.

The California Commission on the Effects of the ERA has stated that the segregation of the sexes in sex education classes would be constitutionally prohibited by the ERA.

Would you agree that this would result from the ERA?

Senator **Tsongas**. Mr. Chairman, why do we not call a spade a spade here?

Senator **Hatch**. Yes.

Senator **Tsongas**. What you are trying to do is to suggest that there are a whole host of questions which may go to the courts.

Senator **Hatch**. Exactly right, exactly right.

Senator **Tsongas**. And what you are doing, in essence, is providing a list of particular examples in which the questions are ambiguous and may end up in the courts. That is supposed to be the argument against the ERA.

I will give you an equivalent list of questions involving the issue of abortion and I will then call upon you to follow the logic of the argument you have made here today and withdraw your name from the human life amendment.

Senator **Hatch**. I will answer every one of those questions to the best of my ability.

Senator **Tsongas**. And I will answer all of your questions in writing—every one that you can ask today and all that you can ask in writing—and I would then call upon you to do the same thing, which is to support the ERA.

Senator **Hatch**. I would be happy to do it; I have no problems with that.

What I am saying is this: these are not obscure, or trivial questions. These are questions that go to the root of the ERA; these are issues that are going to affect every American. These are questions that you need to answer as the chief sponsor of the equal rights amendment.

Look, I will skip over most of them. Let me just go to one——

Senator **Tsongas**. If the Chairman was really serious about having——

Senator **Hatch**. I am really quite serious.

Senator **Tsongas** [continuing]. Particularly detailed answers to these questions, the chairman would have provided them to myself and to Senator Packwood before the hearing. You knew damned well that these were specific issues——

Senator **Hatch**. That is right.

Senator **Tsongas** [continuing]. That no one coming here unprepared could answer. I will answer those questions in writing, and would say to you that having done that, I will then call upon you, having resolved that particular part of the argument, to join us in ERA.

And if you do not, then I would call upon you to at least use the same logic applied to the human life amendment, and withdraw the amendment because of the anticipated legal turmoil that will take place should it pass.

Senator HATCH. I would just remind the Senator with regard to the abortion issue that my amendment will take an issue now decided by the courts and return the decisionmaking process to the legislative bodies of this country—the elected bodies in this country.

Your amendment takes a series of decisions decided now by elected representatives and gives them to the courts, which are unelected and unaccountable.

Senator TSONGAS. Does the chairman suggest that the State courts would not get involved in litigating the issue of abortion if you returned it to the States?

Senator HATCH. I have no doubt that there will be many litigated issues, and I would be happy to answer any and all questions. Let me just ask you one more.

Senator TSONGAS. That is the point you are making here, that if these things are unresolved, we should not pass it because there will be litigation.

Senator HATCH. Not necessarily.

Senator TSONGAS. You just admitted that on the abortion issue, they are going to be in the State courts ad nauseum. So, the logic has to apply both ways, Mr. Chairman, not just in one direction.

Senator HATCH. That is fine. Let me ask you three or four more questions. These all involve well-known and recurrent issues. They are genuine issues that exist today; all I want is your opinion on how the equal rights amendment—your proposal will be applied with regard to these issues.

Let me go to the military issue.

The issue of the impact of the ERA upon the military has, of course, been one of its most controversial aspects. Now, I would just like to ask you several questions in this regard.

First, would the equal rights——

Senator TSONGAS. If the chairman was so interested in my viewpoint, why were these questions not submitted when we would have a chance to review them and give you detailed answers?

Senator HATCH. In all the hearings I have ever held, we have never submitted questions to the witnesses in advance. I would have been happy to have done so if you had asked, but the fact of the matter is I am going to ask them. These are not difficult questions.

Senator TSONGAS. But I would be glad to get back to you so that I have the same time to prepare the answers that your staff did preparing the questions.

Senator HATCH. Senator, these question have been debated for 12 years—50 years, some people say. This is not something that is incomprehensible or that I am suddenly springing on you.

Senator TSONGAS. Did the chairman prepare these questions or did staff prepare the questions?

Senator HATCH. I did a lot of work on them myself.

Senator TSONGAS. Did you prepare all those questions?

Senator HATCH. As a matter of fact, I have written an article on this, I have done a lot of——

Senator TSONGAS. Did you prepare those questions? The answer is no.

Senator HATCH. Senator, let me ask the questions. When I come before your committee, you can ask me questions, OK?

Let me just ask you this. And even if staff did help, so what? What is wrong with that?

First, would the equal rights amendment result in the overturning of the Supreme Court's decision in *Rostker* v. *Goldberg* that Congress can limit draft registration to men? Would this policy continue to be constitutional under the equal rights amendment?

Senator TSONGAS. I would be glad to supply a detailed, thoughtful answer to the committee, taking the same time to respond that the committee did to pose the question.

Senator HATCH. Can you give me a yes or no on that for today? And then I will be happy to submit these in writing to you as well and we will put your detailed answers into the record as well.

Senator TSONGAS. Well, I would appreciate the opportunity to look at these questions in detail and submit the responses.

Senator HATCH. Let me ask you one that I think is even easier than that. Would the ERA result in women being assigned to combat units and related duties on an identical basis as men?

Senator TSONGAS. I did not hear the chairman.

Senator HATCH. Would the ERA result in women being assigned to combat units and related duties on the identical basis as men?

Senator TSONGAS. I have the same response, Mr. Chairman.

Senator HATCH. You are not going to answer?

Senator TSONGAS. I mean, I have feelings about it, but I would rather have the time to respond.

Senator HATCH. Well, tell me your feelings. That is all I want. You know, I am not going to hold you to it. [Laughter.]

Maybe the public will, but I will not. I just want to build a record.

Senator TSONGAS. Mr. Chairman, if you are not going to hold me to it, then you would have no objection to our having the same opportunity to respond that you did putting the questions together.

Senator HATCH. I will be happy to give you the questions in writing, but will you respond to that question?

Senator TSONGAS. I will, in writing.

Senator HATCH. All right. How about this one? Do you agree with the U.S. Civil Rights Commission that sex harassment of female enlisted personnel is pandemic, and that this is encouraged by the "discriminatory environment" of the military, including a wide variety of gender-based regulations and restrictions?

Would each of these allegedly discriminatory regulations and restrictions have to be eliminated under the ERA?

Senator TSONGAS. It is a question that we will take a look at and respond to the chairman on.

Senator HATCH. Well, would you agree with Professor Emerson that pregnancy in the military justifies only "slightly" different conditions of service for women? Would the military have to make greater accommodations than they do now for pregnant women in the military? I believe the estimates are around 10 percent of females in the military are pregnant at any given time.

Could you give us your response on that?

Senator TSONGAS. Well, I think in that case you would have certain adjustments that would have to be made for women in the military. But, again, I would respond to that in writing as well.

Senator HATCH. Would you agree with Professor Emerson that the former WAC units would have had to be abolished under the equal rights amendment?

Senator TSONGAS. I do not think that it would, but I will respond to that as well.

Senator HATCH. OK, OK.

Senator TSONGAS. We have not covered unisex toilets, Mr. Chairman. Do you want to get into that as well? [Laughter.]

Senator HATCH. Well, I may get there yet.

Senator TSONGAS. Well, we are on our way there.

Senator HATCH. There are enough important issue that I do not think we need to cover that one.

Let me ask you about seniority systems. As you know, labor seniority systems have come in for some criticism in recent years because their basic premise, last hired-first fired, tends sometimes to work to the detriment of last-hired minorities.

Indeed, I believe that this issue is at present a major controversy with respect to your own Boston firefighters and police. Minority groups are arguing that traditional seniority practices discriminate against them.

Now, would you agree with the U.S. Commission on Civil Rights that the ERA "will be an important legal weapon to counter such sex-based discrimination" in seniority systems?

Senator TSONGAS. You will end up in the same position you are, Mr. Chairman, because we are committed in this country to racial equality. If you pull back on ERA because you are afraid of that particular question being litigated, then you have the same responsibility to pull back on racial equality for exactly the same reason.

Senator HATCH. So as I interpret your answer, the ERA would call seniority systems into question?

Senator TSONGAS. What I am telling you, Mr. Chairman, is that issue may well end up in court as well.

Senator HATCH. Well, I think all of them seem to be going to end up in court.

Let me ask you this. Proponents of the ERA have made great fun of critics who have suggested that the ERA would render unconstitutional State laws against homosexual marriages. Now, these critics make the point that since the purpose of the ERA is to equate race and sex discrimination with respect to their judicial standard of review, laws against homosexual marriage would be no more constitutional than laws against interracial marriage.

An article in the Yale Law Journal has argued that "the stringent requirements of the proposed ERA argue strongly for removal of the stigma of deviance by granting marriage licenses to homosexual couples who satisfy reasonable and nondiscriminatory classifications."

My question is what would be the impact of the ERA? Would it make laws against homosexual marriages unconstitutional?

Senator TSONGAS. I would be glad to look at that, Mr. Chairman, and respond to you.

Senator HATCH. OK. I might mention that Barbara Babcock—one of the authorities on sex discrimination in the law and who is for the equal rights amendment—said about the effect that the ERA will have on discrimination against homosexuals: "It is hard to justify a distinction between discrimination on the basis of the sex of one's sexual partners and other sex-based discrimination."

James White, who is a professor of constitutional law at the University of Michigan, said:

> Conceivably, a court would find that the state had to authorize marriage and recognize marital legal rights between members of the same sex.

Paul Freund, who is a renowned Harvard Law School professor and one of the most distinguished constitutional scholars of the 20th century, said:

> If the law must be as undiscriminating concerning sex as it is towards race it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation. Whether the opponents shrink from these implications is not clear.

Rita Hauser, who is a distinguished New York City lawyer and who was our U.S. representative to the U.N. Human Rights Commission said:

> The ERA, if adopted, would void the legal requirement or practice of the States limiting marriage, which is a legal right, to partners of different sexes.

Senator TSONGAS. Is the chairman suggesting that the issue of gay rights and gay marriages will not be litigated if the ERA does not pass?

Senator HATCH. No. I think they may well be litigated, but there is no evidence in the text or history of the present constitution that they will be successful. If the equal rights amendment is passed, I personally believe that laws that deny legal benefits to homosexual marriages may well be ruled unconstitutional. I think the courts will be the primary decisionmakers.

I believe that the inflexible way the equal rights amendment is written, these laws may be stricken and that there may be wholesale changes in the laws in this society as a result of this very simply worded amendment that looks so simple on its surface.

Senator TSONGAS. Mr. Chairman, I would be glad, on all those issues, to give you the position of myself and Senator Packwood. If you will give me your positions on the same issues, we will see which ones we have a conflict on and try to sit down together and resolve them.

Senator HATCH. I admit that I do not have the answers to all these things; I just want to know what is the intention of the sponsors.

Back to that last point, the equal rights amendment uses the term "sex." "Equality of rights shall not be denied or abridged on account of sex." Now, let me just create a little bit of legislative history with you, if I can.

Is it the case that the term "sex" in this instance refers only to distinctions between male and female and that it does not refer in any way to the concept of sexual preferences or sexual orientation or sexual affectation? Am I accurate in stating this, in your opinion?

Senator TSONGAS. I believe that it does, Mr. Chairman, but I would like a chance to review that in greater detail.

Senator HATCH. We will submit these to you and, of course, allow you a sufficient period of time to answer.

Now, let me just say this. We hear a great deal about the ERA being necessary to address the situation by which women only earn 59 cents to every $1 earned by men. Tell me what the equal rights amendment will do about that.

Senator TSONGAS. Perhaps it would give us a situation where women in this country do not have to organize so actively to pass the ERA amendment. They can spend more time trying to have the same equality that you and I have in pursuing jobs.

Senator HATCH. They can pursue it in court is what you are saying.

Senator TSONGAS. Excuse me?

Senator HATCH. They can pursue it in court, then?

Senator TSONGAS. I did not say that, Mr. Chairman. What I am telling you is that we are in a situation where if you are born female in this country, you have all these inequities to face.

If this Senate and this House and this country put the issue behind us, then you could move toward a position of equality without going into the courts. Try to kill the ERA again, which in essence is what many would like to do, and the issue will be litigated for a very, very long period of time.

If the argument is made that there will be no litigation if ERA is not passed, I would submit to you that that has not been the history of this country; it will not be what is going to happen in the future.

I admire the tactics the chairman has used and the staff work that went into putting those questions together. You are a worthy opponent, Mr. Chairman.

Senator HATCH. You are tough yourself, Senator.

Senator TSONGAS. I will expend the same amount of time answering the questions as your people did preparing them, and I would hope we would have a chance to sit down, compare our answers one to the other, see which ones are unresolved, and then we will do the same thing on the human life amendment.

Senator HATCH. Well, my door will be open. I just want to say this to you. I think Senator that these questions are not new questions, but they have been somewhat derogated through the years by those who choose to rely only on shibboleths and slogans and symbols. Both sides have been at fault here.

But these are serious questions; they involve the rights of every individual in this society. We really ought to answer these questions and we ought to make sure that something is not locked into the Constitution before they are fully answered.

We ought to make whatever changes need to be made in the language of this amendment so that we can resolve these conflicts as much as possible in advance.

I will just say this to you. I have a lot to learn in this area. We intend to have the best people we can on both sides of this issue before this committee and we will just see where things come out.

These questions are important questions. They are not insignificant; they are not trivial. This country is going to be in an uproar for years to come if the ERA is enacted without some reasonable resolution of these fully anticipated questions. It is our obligation to see that this is not the case.

I have taken enough of the time, Senator Thurmond.

Senator TSONGAS. May I respond to the chairman?

Senator HATCH. Sure.

Senator TSONGAS. Mr. Chairman, you are a sponsor of the amendment to balance the budget.

Senator HATCH. That is true.

Senator TSONGAS. I remember that discussion very well and there were a number of important questions that were raised that would have to be resolved. For example, how does one resolve the question of entitlements if you do not have a balanced budget? That would have ended up in the courts. It did not prevent the chairman from sponsoring——

Senator HATCH. Not necessarily. We put language in the report that was very clear on that issue. In fact, we addressed every issue that was raised with clear language in the report. Now, we may have missed some, but if you will point them out to us, we will be happy to tell you where we stand, what the amendment is intended to mean.

On any constitutional amendment that I bring forward, I will say where I stand on the issues. I will not say we will let the courts decide the matter.

Senator TSONGAS. Do you think that if that amendment should pass, it would not be in the courts?

Senator HATCH. I think any constitutional amendment may go to the courts. But I think it is our duty, as legislators representing the people of this country, to make sure we know what an amendment means and to make sure the American public knows about it so that together they can make an informed decision as to whether or not they want to adopt an amendment.

We should look into these matters very thoroughly and carefully. This is the Constitution of the United States, not some statute we are talking about, and I think it is pretty important.

Senator TSONGAS. Mr. Chairman, I fully agree. I think that marching behind slogans is reprehensible. I felt that way last night when people who signed on to the balanced budget amendment voted to raise the debt ceiling limit.

Senator HATCH. Before I turn to Senator Thurmond, I'd like to read a quote from Roscoe Pound, a former dean of the Harvard Law School. He said:

> If anything about this proposed amendment is clear, it is that it would transform every provision of law concerning women into a constitutional issue to be ultimately resolved by the Supreme Court of the United States. Every statutory and common law provision dealing with the manifold relation of women in society would be forced to run the gauntlet of attack on constitutional grounds. The range of litigation is too great to be foreseen.

I would rather let elected legislative bodies resolve these issues. I can take my losses when I disagree as long as there is a chance of coming back and correcting problems and unintended results when they become more apparent. But I think we ought to be very, very careful, that we do not put something in the Constitution that is going to create more problems than it solves and deny decisionmaking authority to the Congress and the States.

Senator TSONGAS. Mr. Chairman, I agree and I would hope that the specter of litigation does not by itself cause us to turn our backs on equality, because if we do that, in essence, we have no choice but to go back to the beginning, when the only equality you will have in this country are people who are free, who are white, who are 21, who are male and who own property. If that is where we are going, let us simply say it and we can have our 18th century ideals returned and we will not have to worry about all these issues. I would hope that it is the chairman's intent, unlike the statements he has made back home, to let us try to resolve these conflicts together. Let us see if we can have some resolution of these particular items. If we can, fine; if we cannot, let us go ahead.

Senator HATCH. I agree.

Senator TSONGAS. And perhaps the chairman would join us in sponsorship with the other 57 Members of the Senate.

Senator HATCH. Senator Thurmond?

The CHAIRMAN. Thank you, Mr. Chairman.

Senator, I was one of the sponsors, as I stated, of this amendment, the original amendment. Since then, so many questions have arisen about it until it is very indefinite as to just what this amendment means. That is the reason I did not cosponsor it this time, but my mind is open.

If we can clarify the situation and make all these questions clear, that is one thing. But if we cannot, then it might be better to proceed by statute rather than a constitutional amendment, so if we make a mistake, we can change it by a majority vote. It is very difficult to get two-thirds to repeal a constitutional amendment.

Senator TSONGAS. I might say that the same argument applies to the balanced budget amendment. If I were to suggest to you ambiguities on that amendment, would you withdraw your sponsorship of that as well?

The CHAIRMAN. I was the chief sponsor of the constitutional amendment and we anticipated the various issues, and I think we answered them in the debate. If you recall the debate, I think we answered the various points that were raised because we had explored every facet of it and we thought we had answers.

But from your answers here this morning, I do not believe you have got an answer to these questions, have you?

Senator TSONGAS. No, I am not suggesting that we do, Mr. Chairman. Some of these will be litigated. The question is, Senator Thurmond, whether that is enough to tip the balance against the amendment.

The CHAIRMAN. As the chief sponsor of this amendment, it seems that you would have had an opinion on these questions that we just asked you. I had a lot of questions to ask you, some of them being somewhat similar to Senator Hatch's, but he has asked them and there is no use for me to repeat them. But do you not have an opinion on those matters that he asked you about?

Senator TSONGAS. I will have an opinion. But, Senator Thurmond, I just would request that if we are going to talk about this thing in a rational manner, I have as much right to ponder my answers to these questions as the committee did putting them together.

I would hope that I would be allowed that particular opportunity, in that the committee would do what other committees do, and that is review the written responses.

The CHAIRMAN. Well, Senator Hatch said he would give you that opportunity. But as the chief sponsor of the amendment, I would have thought that you would have anticipated and explored all the different facets of this amendment and all the phases of it, and been able to express yourself as to how you feel.

It may be different from the way some other people feel, or it may not be the final answer. But it seems that if you introduce an amendment, you have an opinion on just what it will do, and that is what we are trying to find out here. What will this amendment do, and what will it do on these various questions that have just been propounded to you? But you do not seem to have a fixed opinion on any of these matters.

Senator TSONGAS. Well, I gave you answers on some, but even on those that I did respond to, Senator Thurmond, you are quite correct that you have a right to have responses to them, and those responses will be forthcoming. I simply am asking that the committee give me the right to have a chance to look at them and respond to you.

I did not anticipate the questions; I did not anticipate the tactics. I commend the committee on both, and I will respond as soon as I can.

The CHAIRMAN. Well, if you find from your study and research that you are now going to make—evidently, you have not made it heretofore—if you find that there is indefiniteness or weakness or indecision in this amendment, I imagine then that you would wish to offer amendments that would cure those matters, would you not?

Senator TSONGAS. I would not. I would not presume that every question is going to be resolved, just as the human life amendment is not going to resolve all questions. If you go down one path, you go down the other and you are going to end up in the same situation.

If you apply certainty of litigation as the only test for an amendment, you have to apply that test elsewhere as well.

The CHAIRMAN. Well, if you conclude now from your research that it is unclear what the effect of this amendment will be, I presume you would wish then to make further study or to consider changes and amendments so that it is clear to carry out your wishes, would you not?

Senator TSONGAS. Well, perhaps a preferable alternative would be to sit down with the distinguished Senator from South Carolina and see whether we can arrive at some accommodation.

The Chairman. It is not a matter of accommodation. It is a matter of determining just what this amendment means, just what the effects will be, just how broad it is.

Senator Tsongas. Why can we not work together to do that?

The Chairman. Now, it has been suggested that the language of the ERA is so broad that it will necessitate decades of judicial interpretation. Would not the interests of the American people be better served by an amendment that is specific enough to provide some insight as to its overall impact on our society?

Senator Tsongas. We would be in the same situation, Senator Thurmond, as we were on the amendment that eliminated racial inequality. When that amendment passed, did anyone suggest that there would be no litigation? Did anyone suggest that we would not have the *Bob Jones* case before the Supreme Court?

There has been litigation, but would Senator Thurmond suggest that we turn our backs and reject the amendment on racial equality because there has been litigation? I do not think so.

The Chairman. But do we not have an obligation as Senators to determine what is wise and not leave it to the courts to determine what is wise? We are the legislative body; we make the policy. We make the laws; the courts interpret the laws.

Senator Tsongas. I think we have that responsibility, and I am trying to indicate to the Senator from South Carolina that I am willing to work with him to try to resolve these matters.

The Chairman. Now, it has been suggested that if ratified, the ERA would invalidate laws and regulations preventing males and females from residing in the same housing facilities, such as college dormitories and military barracks.

However, it has been further theorized that present sleeping assignments segregated by sex could be perpetuated on the basis of the constitutional right to privacy. In light of the fact that some scholars have called the right to privacy a mere legal hypothesis, is there any wording in the ERA that can be pointed to as guaranteeing tnat, for example, both male and female military personnel will not have to be quartered in the same sleeping facilities?

Senator Tsongas. Mr. Chairman, I do not believe so, but let me say that I have no doubt that the Senator and his staff have been able to get together an equal number of questions involving the application of the ERA.

My problem is this: I have an 11:59 airplane to Boston, where I have to give a commencement speech and I would appreciate if all these questions—and I am sure that they are without end—would be put in writing and that I be given a chance to respond to them.

The Chairman. Well, I will just ask one more then, so you can get off on your plane.

While most aspects of the impact of the ERA are uncertain, it is generally conceded that upon ratification women would become subject to the military draft. Such a result would raise the issue of whether women should be compelled—and I use the word "compelled"—to serve in combat. And if you remember the military bill we passed 2 years ago, we specifically included in there that they would not be subject to combat. Now, is this amendment going to override that?

Senator TSONGAS. I do not believe that it would, but again I would like a chance to reflect on that question and give you a written response.

The CHAIRMAN. Women with small children also present a special problem, especially if they happen to be the heads of single-parent households. Now, how would you foresee these problems being addressed?

Senator TSONGAS. Which problem are you referring to?

The CHAIRMAN. Well, I was just speaking about the women with small children and the women in combat.

Senator TSONGAS. I do not understand the linkage between them.

The CHAIRMAN. Now, the point is that it sounds good. As Governor of South Carolina, I specifically, at my inauguration, demanded that women have equal rights with men in every way possible. I have always favored equal rights in every way, and I want to see that.

Of course, I think the basic thing they want is equal pay for equal work. On the other hand, we do not want to put into the Constitution something that is going to mandate things that might happen, as, for example, some of the questions Senator Hatch just asked you.

So, I hope you will look carefully into this and help the committee all you can and give us your opinion as to what will be the effect of these various matters.

Senator TSONGAS. I would be glad to do that and I would hope that the committee would look at those responses with an open mind about potential endorsement of the ERA amendment as the issue proceeds.

The CHAIRMAN. I would like to support this amendment, but I am keeping my mind open because I want to be certain about what we are doing. These various questions have arisen chiefly since the amendment was passed and when I went on it as a cosponsor years ago. These questions now are disturbing me and I want to see them solved before I support it again, or maybe we could offer some amendments that would cure this thing, because I do want to see women have equal rights in every way with men.

Senator TSONGAS. I will also supply for the committee a list of anticipated ambiguities that would relate to the right to life amendment and the amendments that have passed the Congress in the past, and maybe we can compare them and see whether we want to turn back the clock and reverse those which have already been passed.

The CHAIRMAN. Thank you, Senator, for your appearance.

Senator HATCH. Senator Leahy, we will turn to you.

Senator TSONGAS. Could I reiterate my request? I have a commencement speech in Boston and I have an 11:59 plane.

Senator HATCH. I did not realize that, Senator.

Senator LEAHY. I have no questions for the distinguished Senator from Massachusetts.

Senator HATCH. Senator Dole, do you have any questions?

Senator DOLE. Not if he has an 11:59, but I would not have any if he had a 12:59. [Laughter.]

Senator **Hatch**. Let me do this, Senator. If the Senator desires, we will be happy to open this committee again for you in the future if you would care to testify.

Senator **Tsongas**. Let me say, Mr. Chairman, that if only your talents and that of your staff could be directed toward supporting this amendment, I think we would all be a lot better off, and I commend you on your diligence and skill. Why do we not work together and put this issue behind us?

Senator **Hatch**. Well, I would like nothing better than to resolve this issue; I have some ideas that may do it and I will be happy to discuss them with you. We will give you adequate time to answer these questions.

We appreciate your being here very, very much.

Senator **Tsongas**. I will make a serious effort to be more current on the Yale Law Journal in the future.

Senator **Hatch**. Well, it is an important work. We appreciate having you here. Thanks, Senator Tsongas.

Senator **Leahy**. Mr. Chairman, I wonder if I just might be recognized for 2 or 3 minutes.

Senator **Hatch**. Sure, Senator Leahy.

Senator **Leahy**. I have a short statement.

Senator **Hatch**. Sure.

OPENING STATEMENT OF SENATOR PATRICK J. LEAHY

Senator **Leahy**. Mr. Chairman, the long battle over equal rights for women has been a struggle marked by many ironies. Those who opposed the ERA argued that women did not need the protection of the ERA; what they needed was protection from equality.

You heard that patience would produce legislation equalizing equality of justice for men and women, but you also heard that equal rights and obligations for each sex were not really good for society.

[Whereupon, Senator Thurmond assumed the chair.]

Senator **Leahy**. You heard that women were better off at home, and you heard it from a woman attorney who spent years in airplanes and on the road to make her point that women were better off at home. [Laughter.]

Now, the equal rights amendment was defeated because a minority of Americans were able to sell just enough of the message that no woman should stray very far from traditional roles. They were able to sell the notion that any woman in a closely knit family could not aspire to be treated as a legal equal to the men in the family or in the country.

The equal rights amendment cannot change who any of us is or what kind of person we will become, nor would anybody in this room want it to. It will not change the nature of love or intimacy, nor will it redress the estrangements between people of either sex that so often accompany modern life.

The equal rights amendment is not about any of these things. It is about simple justice. The fact is that we live in a society with generations of official bias against women. The results of that discrimination are clearer than ever in hard times when both men and women face a superhuman struggle to make ends meet. But women's struggles are made even harder by deeply engrained inequality on the job.

I hope and expect that the second struggle for the equal rights amendment will be less over mythology and more about respect; less about women in combat and more about paychecks; and less about the loss of intimacy and more about the true human potential of both sexes.

This century has seen the greatest concerted effort ever made by a single society to root out racial and religious discrimination, and that effort is far from over. The same society cannot and will not ignore as deeply rooted an evil as sex discrimination, nor will it be bullied into believing that with equality of rights, the uniqueness and diversity of spirit that men and women each bring to life will be lost.

I believe that this Congress will adopt, and the Nation will ratify, the equal rights amendment. Its passage will not transform our society overnight, but it will provide men and women with the dignity enshrined in law to work hard together towards that transformation.

So, I value the hearings that begin today. I think they are extremely important, and I look forward to this matter coming once again to the floor of the Senate. Thank you.

The CHAIRMAN. Thank you, Senator.

Ms. Marna Tucker, I believe, is the next witness, if she would come around. Will you have a seat, Ms. Tucker?

Do you have anyone with you, Ms. Tucker?

Ms. TUCKER. No, I do not, Senator.

The CHAIRMAN. I understood that Prof. Walter Berns was on the panel with you. Is he here?

Dr. BERNS. Yes.

The CHAIRMAN. Would you come around, Mr. Berns, from the American Enterprise Institute? Have a seat.

Ms. Tucker, you may proceed.

[Whereupon, Senator Hatch resumed the chair.]

Senator HATCH. Go ahead, Ms. Tucker.

Thank you, Senator.

STATEMENT OF A PANEL CONSISTING OF MARNA S. TUCKER, ATTORNEY, WASHINGTON, DC, AND WALTER BERNS, RESIDENT SCHOLAR, AMERICAN ENTERPRISE INSTITUTE

Ms. TUCKER. Chairman Hatch, members of the subcommittee, my name is Marna S. Tucker. I am an attorney in the District of Columbia. I am in private practice and I specialize in domestic relations law and employment discrimination work.

I am a member of the Women's Legal Defense Fund, an organization which was founded in 1971 and of which I was one of the founding members. I am also a member of the Board of Trustees of the National Women's Law Center. It is from these organizations that I have gotten my interest in the equal rights amendment, but I am testifying today on behalf of myself.

I wish to thank the subcommittee for the opportunity to testify on Senate Joint Resolution 10, the new equal rights amendment. I will highlight my testimony and I would like to ask that my formal statement be submitted in its entirety for the record.

Senator HATCH. Thank you. Without objection, we will put your full statement in the record.

Ms. TUCKER. I am here today to urge this committee and the Senate to demonstrate to the women of this Nation that discrimination on the basis of sex has no place in American life by again submitting to the States for ratification an equal rights amendment to the Constitution of the United States.

The equal rights amendment was first introduced 60 years ago by the National Women's Party to complement the women's newly won right of suffrage. And here we are 60 years later; women have only just begun to achieve meaningful progress.

The inferior status of women in virtually every economic and political sphere remains the norm. The exclusion of women from participation at many levels in our society is still an embarrassing reality and it is a national disgrace.

The continuing existence of laws which sanction inequality is a governmental expression to the public that inequality of rights is an acceptable public policy. The mere existence of these laws makes women second-class citizens. Only an equal rights amendment to the Constitution will end this shameful treatment and will signal the Nation's clarion call once and for all to equality.

Even those rights we have painfully won over the years are incredibly fragile. For example, the administration during the past 2 years has effectively undermined existing Federal antidiscrimination legislation by its feverish rewriting of Federal regulations designed by prior administrations to encourage equal opportunity.

Only with the passage of the equal rights amendment will our national commitment to equality for women be unequivocally and emphatically affirmed for all of our citizens for all time.

During the course of these hearings, you will undoubtedly hear many, many reasons why an ERA is needed to guarantee equality for women. In my own testimony, I would like to limit my remarks to a discussion on the areas that I feel I know best—family law, employment, and education as it relates to employment.

In the area of family law, for example, every day I see in my own practice how the institutionalized discrimination against women as homemakers contributes to their desperate economic condition following divorce—a kind of discrimination that will not be tolerated under the ERA.

I am talking about an economic disparity between divorced men and women that studies are just now beginning to corroborate. Studies have shown that in the first year immediately following divorce, the financial security of women plummets by 73 percent and that of men increases by 43 percent. [Applause.]

As a lawyer, I find myself saying to my women clients that they cannot expect equality of treatment in the courts in the area of family law. I say that it is a man's world in the courtroom. I say that sexist presumptions prevail, and the only hope we have for equality of treatment under the current state of the law is for an enlightened judge that will hopefully listen to the arguments I raise.

Child support awards are totally inadequate. Why judges feel that they cannot award more than half a man's salary to a woman who has total responsibility for raising three-fourths of the family, I will never understand.

Spousal support, or alimony, is chintzy. I find judges saying over and over again, "Oh, the woman is making $15,000 a year; that is good pay for a woman; she does not need alimony."

Marital property distribution favors the wage earner. Why does this happen? Why do judges respond that way? My own opinion on that is based in a lot of the sexist presumptions that prevail in the law. Those judges have some feeling that somehow men need money for status more than women, and they know that women will survive.

They know that women will not let their children go without child care; if they have to go to work, they will not leave them on the street. They know their children will not go without food. The women will cut the meat a little thinner and eat less themselves.

They know that women will survive, so they have no reason to change the rules, and they know they will survive because they have survived for centuries. And men have traded on that, and it is time to stop that right now in the family law courts.

Three problems that I have mentioned have found their genesis in the underevaluation of the homemaker's contribution to the family and to the acquisition of marital property. Very simply, courts tend traditionally to view money as the controlling currency. Women want their contribution as wives and mothers to be viewed as equal currency. That is what we ask for and that is what the ERA will give us.

In the 16 States which have incorporated an equal rights amendment in their State constitutions, the experience has shown that according legal recognition to the value of homemaker services does insure economic protection for homemakers and equity in the marriage.

In the area of child support, State ERA's have been used to establish not only a mutual obligation for support of the parents, but to accord economic value to custodial homemakers' nonmonetary contribution of child care and nurturing. There are courts in Pennsylvania and Texas and Colorado who have all recognized the value of the nonworking parent's custodial contribution and they have begun to issue support awards in accordance with the respective abilities for each spouse to contribute.

The importance of these rulings for the custodial, nonworking parent is clear. Recognizing the economic value of the homemaker's contribution in the face of an equal and mutual obligation of support has resulted in comparable and equivalent financial support being assessed against working, noncustodial spouses, men or women.

In the distribution of marital property, State ERA States have been responsible for equalizing each spouse's share of marital property at the time of divorce. Consistent with the newly emerging concept of marital partnership, the Pennsylvania courts, for example, have interpreted that State's new equitable distribution law to require a starting presumption of equal distribution.

Finally, married women, and particularly homemakers, have also acquired new strength in the area of spousal support as a result of the passage of ERA's. A Pennsylvania court recently struck down a rule imposing an arbitrary limit on a wife's right to support, declaring the rule inherently sexist in its requirement that a wife receive less than one-half of her husband's earnings despite her own needs.

The increased value accorded the husband's labor, accompanied by the devaluation of the wife's work as a homemaker, were viewed by the court as violative of the spirit, if not the letter, of Pennsylvania's equal rights amendment.

Clearly, the extension of legal rights and benefits to both men and women and the simultaneous removal of gender based presumptions and burdens that have been triggered by State ERA's have laid the foundation for a changing family law system that is more equitable and more responsible to each family member's needs.

In the emerging system, and the system that I hope to deal with my clients in someday, it is the needs, the abilities, and the unique contributions of each family member, rather than antiquated rules based on sex stereotypes, that form the basis of the laws, and would inform judicial decisionmaking.

We need an equal rights amendment to the Constitution so that these principals that we are just beginning to see emerge in the States that have equal rights amendments will be extended to all 50 States.

I would like to call the committee's attention to another area in which the pervasive discrimination against women clearly calls for the remedy of the equal rights amendment. I am, of course, speaking of the interrelated issues of employment and education.

As was highlighted earlier in some of the remarks, employed women today are paid only 60 cents for every $1 paid to men. There are, we feel, two principal reasons for this disparity.

First, equal employment laws are inadequate and enforcement is insufficient. Second, our system of public education tends to deny women training for all but a handful of low-paying, dead-end women's jobs.

The enactment of title VII of the Civil Rights Act of 1964 was a significant step in addressing the more obvious problems of employment discrimination on the basis of sex. But the statute has many gaps in its coverage. The most glaring omission is that the statute fails to protect the employees of employers of fewer than 15 persons. Another, and particularly ironic, is that title VII was written to deny protection to the staffs of the Members of Congress and the Federal judiciary.

But as useful as it may be and as much as the case law has developed, title VII is still only a statute, and statutes can be repealed at the whim of Congress. Only when the policies of equal opportunity which underlie title VII are mandated by the Constitution itself will we feel truly secure that an end to discrimination in employment will be possible.

Equal educational opportunities are effectively denied to women by many jurisdictions through a pattern of formal restrictions and active discouragement of women and girls from entering vocational programs.

Moreover, the military, as the single largest training institution in the Nation, is one of the principal discriminators against women in these programs. Again, only an equal rights amendment will insure that women will be able to obtain equal educational opportunities, and thereby break through the trap of continually being only relegated to women's work.

Of course, the equal education opportunity laws, like title IX, are only statutes, and as such these statutes can be repealed. Law-by-law, State-by-State efforts at eliminating sex discrimination simply will not do.

I think Representative Barbara Mikulski said it best when she said that a law-by-law approach to eliminating sex discrimination is like prohibiting slavery plantation by plantation.

We will never see an end to discrimination unless nondiscrimination in all governmental activities, including education, becomes the fundamental law of the land.

I now would like to address some issues that the chairman in his questioning of Senator Tsongas raised. When he stated that his objection to the proposed ERA was based on its ambiguous wording—he is concerned that its proponents do not know what it means.

As Senator Kennedy said, and I would like to reiterate, we know what it means, and I would like to respond to this contention. The Constitution and the Bill of Rights is a living document. Many of the phrases which are viable today are from British jurisprudence.

Phrases like "freedom of speech," "privileges and immunities," "equal protection of the laws," "due processes of the laws," "cruel and unusual punishment"—these phrases are all principals that have been set out.

The truth is that the ERA sets out firm principles that are as clear as any of the rights already existing in the Constitution. In reality, today, under our current law and the interpretation of cases under the 5th and 14th amendments, we are far more ambiguous in our position than we would be with an ERA.

The concept of equal protection under both the 5th and 14th amendments has not been given uniform articulation by the courts. There has been a great deal of ambiguity about the meaning of sex equality. ERA is designed to eliminate that ambiguity, not to foster it. It would give less discretion to the courts. It would curtail judicial activism in the area of sex discrimination.

Under the current standards of judicial scrutiny, a sex-based classification must serve important governmental objectives and must be substantially related to achievement of those objectives. That is the current standard for sex equality, as defined by the Supreme Court.

That standard invites courts to be super-legislatures, deciding what the value-laden terms like "important governmental objectives" and "substantially related" would mean.

We now, under our current law, under the 14th amendment, have the least certainty and the least predictability where it concerns sex discrimination. If we had an equal rights amendment, we know then what that means. The ERA will make it clear.

Sex-based discrimination, like race-based discrimination, is intolerable. In extraordinary situations, there may be exceptions. That is true of every constitutional principle, and it has been true of every constitution.

Senator HATCH. By and large, you would equate sex discrimination with race discrimination under the standard of review that you are describing here today?

Ms. TUCKER. I am saying that it would be treated as race discrimination would be, most likely.

Senator HATCH. Would it be treated as a suspect classification or an absolute classification under constitutional law?

Ms. TUCKER. Whether it would be treated as a suspect classification, Senator, I think that might be a little too simplistic to describe it that way.

Senator HATCH. OK.

Ms. TUCKER. Let me explain that. In virtually all race cases and virtually all national origin cases where statutes have had those classifications, they have been struck down—virtually all of those—and they are called suspect classifications, but, in fact, they have been absolute in those terms.

The only exceptions to that have been the Japanese internment cases—certainly, a blot on our past.

Senator HATCH. All of us agree with that.

Ms. TUCKER. OK. And in the sex classifications, we would anticipate the same kind of analysis.

Senator HATCH. Then, sex classifications would be absolutely prohibited?

Ms. TUCKER. If the word "absolute" means that when an issue comes up before a court and all of the facts and circumstances are adjudged case by case—if that is what it means, yes.

Senator HATCH. That is what I was trying to get to with Senator Tsongas.

Would you agree with Professor Emerson that the object of the ERA is, as he said, to "prohibit any differentiation in legal treatment on the basis of sex?" Would you agree with that?

Ms. TUCKER. Yes.

Senator HATCH. Would you agree with Professor Emerson that the ERA must be applied "comprehensively and without exception?"

Ms. TUCKER. I am not sure what he means by "comprehensively and without exception."

Senator HATCH. In all cases it would be prohibited, without exception?

Ms. TUCKER. It means that equal protection of the laws will not be denied on the basis of sex.

Senator HATCH. I see.

Ms. TUCKER. That is what it means.

Senator HATCH. What it basically requires is equal protection?

Ms. TUCKER. Equal protection of the laws will not be denied on the basis of sex.

Senator HATCH. Do you agree with Professor Emerson that the constitutional mandate of the ERA must be, as he said, "absolute?"

Ms. TUCKER. The constitutional mandate may be absolute as to what?

Senator HATCH. Well, as to the permissibility of sex classifications.

Ms. TUCKER. I believe that a classification that is based on sex should be given the strictest judicial scrutiny on a case-by-case basis.

Senator HATCH. So, you would apply the strictest judicial scrutiny?

Ms. TUCKER. Absolutely.

Senator HATCH. Which is constitutional language, establishing sex as a suspect or absolutely prohibited classifications?

Ms. TUCKER. Yes.

Senator HATCH. You said yes?

Ms. TUCKER. Yes.

Senator HATCH. OK. Now, would you agree with Professor Emerson that the issue under the ERA cannot be "reasonable" "or unreasonable" classifications but that the ERA must be interpreted so that sex is simply not a factor?

Ms. TUCKER. Well, Senator, I wish to point out first of all that Professor Emerson's article was written in 1971.

Senator HATCH. Sure.

Ms. TUCKER. I have to tell you that 1972 was the last time I read that law review article when I was teaching. Also, in 1971 when it was written, we did not have the school of law that now exists on constitutional principles. Even Professor Emerson there was really predicting it.

We have developed since that article was written at least three different standards of sex equality, and what I am submitting to you today is that it is time to have that over with. We ought to make it absolutely clear that sex equality is forbidden by the Constitution of the United States, unequivocally.

Senator HATCH. OK. I will have some other questions later, but I wanted to clarify a few points while you were on the subject. You have been very helpful, and I appreciate it.

Ms. TUCKER. Thank you.

Senator HATCH. Go ahead.

Senator LEAHY. Could I just ask one clarification, Mr. Chairman?

Senator HATCH. Sure.

Senator LEAHY. I am not sure whether I understood. Did you say sex equality or sex inequality is forbidden under the——.

Ms. TUCKER. I could not hear you; I am sorry.

Senator LEAHY. In your last answer, did you refer to sex equality or sex inequality as being forbidden under the Constitution?

Ms. TUCKER. Sex inequality.

Senator LEAHY. Thank you.

Ms. TUCKER. Sex equality would be guaranteed.

Senator LEAHY. Sex equality would be guaranteed and sex inequality would be forbidden. OK, thank you.

Ms. TUCKER. I certainly did not mean to make that mistake.

Senator LEAHY. I did not think so.

The CHAIRMAN. That was just a slip of the tongue. I am sure you meant that sex inequality was forbidden by the Constitution. That is what you meant, was it not?

Ms. TUCKER. That is correct.

Senator HATCH. I understand.

Are you finished?

Ms. TUCKER. Just in completing the testimony, Senator, if our years of litigation and lobbying for equality have taught us anything, it is that discrimination against women has been woven through the fabric of our laws. For years, we have sought to root it out one law at a time. We have had some success in this.

But there are too many discriminatory laws remaining for the job to be completed in our lifetime, and new laws are being enacted all the time. It is obvious to me that the only way by which real progress can be achieved in making our society one in which the opportunities and rights of women are truly equal to those of men is for the adoption of the equal rights amendment.

And I ask you to once again submit to the States the equal rights amendment so that America may finally become the land of equal opportunity.

Thank you.

Senator HATCH. Thank you. I appreciate your testimony. I understand that Senator Thurmond introduced both of you, but did not say much about your background.

Marna Tucker is a partner in the Washington, DC, law firm of Vosburgh, Klores, Feldesman & Tucker. She has been an adjunct professor on women's rights at both Catholic University and Georgetown University. She is chairperson of the American Bar Association's Committee on Individual Rights and Responsibilities, and a member of the National Women's Legal Defense Fund.

She testified before our committee on the subject of the bicentennial of the Constitution several years ago, and I appreciated that.

She can take pride in the fact that she was recommended by the Senate proponents as the individual who could best represent the pro-ERA position to this committee at its opening hearing.

Dr. Walter Berns is an individual who has testified before this subcommittee on a number of important occasions. He is a resident scholar at the American Enterprise Institute, and one of the most distinguished constitutional scholars in the country.

Dr. Berns has taught constitutional law for more than 30 years at such institutions as Yale University, Cornell University, the University of Toronto, and presently at Georgetown University. He has written a number of scholarly works on issues of constitutional law. And if I am correct, Dr. Berns further served as the U.S. representative to the United Nations Human Rights Commission.

[Prepared statement follows:]

PREPARED STATEMENT OF MARNA S. TUCKER

Chairman Hatch and Members of the Committee, I am Marna S. Tucker. It is my privilege to appear before you today on behalf of the Women's Legal Defense Fund, which I helped found.

The WLDF was organized in 1971 as a vehicle for educating the public on legal and political issues of importance to women and for facilitating litigation attacking sex discrimination in all forms. Over the years, we have been invited to present our views to Congress on dozens of matters. And, we have participated in hundreds of law suits at all levels of federal and state courts.

We are here today to urge this Committee, and the Senate, to demonstrate to the women of this Nation that discrimination on the basis of sex has no place in American life by again submitting to the states for ratification an Equal Rights Amendment to the Constitution of the United States.

The Equal Rights Amendment was first introduced sixty years ago by the National Women's Party, to complement women's newly won right of suffrage. The feminists of that time recognized that their recent victory was only the beginning of the far more difficult struggle to obtain equality in all aspects of American society. They were, unfortunately, very right in their assessment of how difficult the struggle would be.

Sixty years later, women have still only begun to achieve meaningful progress. The inferior status of women in virtually every economic and political sphere remains the norm. The total exclusion of women from participation at many levels in our society is still an embarassing reality and a national disgrace.

The continuing existence of laws which sanction inequality or accept a diminished status for women have an effect far beyond the literal meaning of their terms. Each of these laws is a governmental expression to the public that inequality of rights is an acceptable public policy. Their mere existence is an affirmation that American women remain second class citizens. Only an Equal Rights Amendment to the Constitution of the United States will end this shameful treatment.

Without an ERA, we know that those rights which have been painfully won are incredibly fragile. Indeed, the Reagan Administration is proving this point beyond our worst fears. The Administration, during the past two years, has effectively undermined existing federal anti-discrimination legislation by its feverish rewriting of federal regulations designed by prior administrations (including Republican ones) to encourage equal opportunity. The Reagan Administration is clearly signaling to the Nation that equal rights for women is no longer an important item on our national agenda.

Only with the passage of an Equal Rights Amendment will our national commitment to equality for women be unequivocally and emphatically affirmed for all of our citizens, for all time.

We have learned that there is no acceptable substitute for an ERA. Neither the Fifth nor the Fourteenth Amendments' guarantees of equal protection under the laws provides us the guarantee of equality we seek. The Supreme Court has made this clear again and again by refusing to view classification based on sex as inherently suspect (as it does classifications based on race).

During the course of these hearings, you will undoubtedly hear many, many reasons why an ERA is needed to guarantee equality for women. In my own testimony, I would like to limit my remarks to a discussion of the three areas I feel I know best: family law, employment, and education. For me, these three areas hold special importance because I see in them more than particular types of discrimination with which every woman can identify. I also see a direct link between them and the phenomenon of the feminization of poverty.

In the area of family law, for example, I see every day in my own practice how the institutionalized discrimination against women as homemakers contributes to their desperate economic condition following divorce - a kind of discrimination that would not be tolerated under an ERA. I am talking about an economic disparity between divorced men and women that we, as women, have always known to be true and that studies are just now beginning to corroborate. Studies have shown then, in the year immediately following divorce, the financial security of women plummets by an average of 73% while that of their husbands increases by 42%.

The root causes of this disparity may be found in inadequate child support awards, unequal distribution of marital property, and insufficient arrangements for spousal support - three problems which themselves find their genesis in the undervaluation of the homemaker's contribution to the family and to the acquisition of marital property.

We know that an ERA will alleviate these aspects of discrimination because, for the past 10 years, we have been watching the steady progress that has been made in many of the 16 states which have incorporated an equal rights amendments into their state constitutions. The experience in these states has shown that according legal recognition to the value of homemaker services does ensure economic protection for homemakers and equity in the marriage. State equal rights amendments have been effectively applied to achieve economic equity in all of these critically important areas.

In the area of child support, state ERA's have been used to establish not only a mutual obligation of support by both parents, but also to accord economic value to the custodial homemaker's non-monetary contribution of child care and nurturing. Courts in Pennsylvania, Colorado and Texas have all recognized the value of the non-working parent's custodial contribution, and have begun to issue support awards in accordance with the respective abilities for each spouse to contribute. The importance of these rulings for the economic well-being of the custodial non-working parent is clear: recognizing the economic value of the homemaker's contribution in the face of an equal and mutual obligation of support has resulted in comparable and equivalent financial support being assessed against the working, non-custodial spouse.

In the distribution of marital property, state ERA states have overturned outmoded common law notions of ownership and have been responsible or equalizing each spouse's share of marital property at the time of divorce. Consistent with the newly-emerging concept of marital partnership, the Pennsylvania courts, for example, have interpreted that state's new equitable distribution law to require (in light of Pennsylvania's ERA) a starting presumption of equal distribution.

Finally, married women and particularly homemakers have also acquired new strength in the area of spousal support as a result of the passage of state ERA's. A Pennsylvania court recently struck down a rule imposing an arbitrary limit on a wife's right to support, declaring the rule inherently sexist in its requirement that a wife receive less than 1/2 of her husband's earnings, despite her own needs. The increased value accorded the husband's labor, accompanied by a devaluing of the wife's work as a homemaker, were viewed by the court as violative of the "spirit if not the letter of the Pennsylvania Equal Rights Amendment ..."

Clearly, the extension of legal rights and benefits to both men and women, and the simultaneous removal of gender-based presumptions and burdens that have been triggered by state ERA's have laid the foundation for a changing family law system that is more equitable and responsive to each family member's needs. In the emerging system, it is the needs, abilities, and unique contributions of each family member, rather than antiquated rules based on sex stereotypes, that form the basis of the laws and inform judicial decisionmaking. The experience in these states demonstrate the value of an equal rights provision in enhancing women's economic and legal status, and highlight the burning need for an Equal Rights Amendment to the Constitution of the United States so that these principles will be extended to all fifty states.

I would like now to call the Committee's atttention to another area (actually two areas) in which the pervasive discrimination against women clearly calls for the remedy of an Equal Rights Amendment. I am, of course, speaking of the interralated issues of employment and education.

Employed women are today paid only 60¢ for every dollar paid to men. There are, we feel, two principal reasons for this disparity. First, existing equal employment laws are inadequate and enforcement is insufficient. Second, our system of public education tends to withhold from women training for all but a handful of low paying dead-end "women's jobs."

The enactment of Title VII of the Civil Rights Act of 1974 was a significant step in addressing the more obvious problems of sex discrimination in employment. But, the statute has many gaps in its coverage. The most glaring omission is that the statute fails to protect the employees of employers of fewer than 15 persons. Another, and particularly ironic, omission is that Title VII was written to deny protection to the staffs of Members of Congress and the federal judiciary. One can only speculate as to what message these exemptions convey to the women of America about Congress' commitment to ending job discrimination.

As useful as it may be, Title VII is only a statute. And, statutes can be repealed at the whim of Congress. Similarly, a lack of commitment of an Administration to enforce statutory policies can undermine the best intention of an earlier Congress. As I mentioned before, we are seeing this now in the Reagan Administration. Only when the policies of equal opportunity which underlie Title VII are mandated by the Constitution itself will we feel truly secure that an end to discrimination in employment will be possible.

Equal educational opportunities are effectively denied to women by many jurisdictions through a pattern of formal restrictions and active discouragement of women and girls from entering vocational training programs. Only an Equal Rights Amendment will ensure that women will be able to obtain equal educational opportunities and thereby break through the trap of continually being only relegated to "women's work."

Of course, equal educational opportunity laws, like Title IX, are only statutes and, as such, can be repealed. Law-by-law, state by state efforts at eliminating sex discrimination simply will not do. We will never see an end to discrimination unless non-discrimination in all government activities, including education, becomes the fundamental law of the land. Only an Equal Rights Amendment will insure that women and girls will be given fair educational opportunities and that the wage gap between men and women will be eliminated.

There is another significant source of education and training to which access by women is severely restricted and frequently denied: that provided by the military services. The military is the single largest educational and training institution in the United States. It has taught millions of persons advanced skills and occupations which they might otherwise never have been exposed to. Indeed, military occupation training is the route by which many poor Americans are able to pull themselves out of poverty. Unfortunately, the military is one of the principal discriminators against women.

Indeed, the Reagan Administration's recent preclusion of women from some 23 Army military occupational specialties, which had been open to them under the previous Administrations, has effectively destroyed the Army careers of many women. Through this discriminatory preclusion, women have once again been denied access to many military occupation specialties which would train them for such non-traditional jobs as carpentry, plumbing, and other skilled trades.

The armed services, may, in a future Administration, reverse themselves. But such a reversal is likely to be only transitory. Only an Equal Rights Amendment will ensure that women members of the armed services will have equal opportunity, based upon their individual abilities, to learn the skills that will significantly improve their economic lot in post-service life. Until an Equal Rights Amendment is added to the Constitution, a principal vehicle for lifting themselves out of poverty (and possibly the only meaningful one left after the massive social program budget cuts imposed by the Reagan Administration) will be denied to women.

If our years of litigation and lobbying for equality have taught us anything, it is that discrimination against women is embedded throughout the fabric of our laws. For years, we (and similar organizations) have sought to root it out one law at a time. We have had some success in this. But, there are too many discriminatory laws remaining for the job to be completed in our lifetime. And, new laws are being enacted all the time. It is obvious to us (as we believe it is to any student of women's issues) that the only way by which real progress can be achieved in making our society one in which the opportunities and rights of women are truly equal to those of men is for the adoption of an Equal Rights Amendment.

The people clearly know this. The Equal Rights Amendment is supported by a margin of two to one in virtually all regions of the country. The will of the people has been frustrated over the past few years by a handful of narrow-minded and cynical state legislators. But, we have an obligation to ourselves and our children not to give up.

We ask you to once again submit to the states the Equal Rights Amendment so that America may finally become the land of equal opportunity.

Senator HATCH. Dr. Berns, we will turn to you at this time. We are delighted to have you here.

STATMENT OF WALTER BERNS

Dr. BERNS. Thank you, Mr. Chairman. Following the example of Senator Tsongas, I suppose I should also list among my qualifications three children, only two of whom are daughters, however.

Senator HATCH. Only two of whom are daughters?

Dr. BERNS. Only two.

Senator HATCH. Well, you are not as good as Senator Tsongas, but——

Dr. BERNS. I am not so sure that that disqualifies me or makes me less qualified to address this issue.

Senator HATCH. I might mention that Elaine and I have six children, three of whom are daughters.

Dr. BERNS. I was struggling to find some example of someone who had eight or nine; you might call him before this committee.

Senator HATCH. Good idea.

Dr. BERNS. I want to say at the outset that I agree absolutely with the effort to abolish all statutes, ordinances and regulations that discriminate against women.

Senator HATCH. So do I.

Dr. BERNS. I would suspect that there is very little argument in this country about that right now; at least there is very little public argument. There may be still some people who harbor that kind of prejudice, but I think the state of opinion in this country is now such that no one will publicly avow such an unenlightened view. My opposition to the equal rights amendment is confined to its ambiguity. I do not know what it means.

Senator HATCH. Can you pull your microphone just a little closer so we can all hear you?

Dr. BERNS. I do not know what it means, and I said it in my prepared statement.

Senator HATCH. We will put your complete statement in the record, without objection.

Dr. BERNS. If you were to conduct a poll, a survey, among the sponsors of this amendment in this Senate—Senate Joint Resolution 10—you would likely find a considerable amount of disagreement as to its intended effect. And I find it somewhat astonishing that this body would propose to amend the Constitution in what everyone regards as a fundamental way, an important way, without knowing as precisely as possible what the purpose of that change is likely to be.

As I say, I do not know what it means. In Senator Tsongas' testimony this morning, I was confirmed in that opinion that the Senate is not yet certain as to what it means.

I must say it somewhat surprised me to hear him say that he had not anticipated the questions that you asked him.

Senator HATCH. These are basic questions on this issue.

Dr. BERNS. Well, they certainly are.

Senator HATCH. You ought to hear some of my difficult questions.

Dr. BERNS. I anticipated them because many of the questions you asked are in my particular statement here. I am not going to read that statement, largely because so much of it has to do with those questions that you asked.

It is not my job to give you or this committee my answer to this. Does this amendment, for example, outlaw a male-only draft? Or would it, with reference to the *Bob Jones* decision yesterday, have the same effect with respect to private schools that segregate on the basis of sex?

For example, to put it simply, would Wellesley College be in the same position as Bob Jones University now if the ERA were to be adopted?

Or to give one other example that you did not mention this morning: What would be the effect of the adoption of this amendment on what I call the second generation abortion cases? I have in mind there specifically Planned Parenthood of Central Missouri against Danforth, where, among other things, the court said, as I mentioned in my statement—in fact, I might as well read it:

"A husband may have a deep and proper concern and interest in his wife's pregnancy and in the growth and development of the fetus she is carrying. But in the event of a conflict between him and his wife with respect to that pregnancy, his interests must give way to the wife's right to have the abortion." Now, it seems to me that the ERA, if it is adopted, would have the effect, if the amendment is read literally, of elevating what the court here describes as his "interest" in the birth of that child into a right to the birth of the child. The courts again have to figure out how you resolve a conflict between the right of the father to the child and the right of the wife to abort the child. This is one of those questions—it is about the only one that I anticipated that you did not anticipate in your questioning of Senator Tsongas.

I would say only one other thing here, really. When Senators or when anyone else tells this committee that these are matters to be left to the courts, it seems to me altogether proper for you to ask the further question. "Are you perfectly willing, Senator Tsongas, to accept any answer to these questions that the courts give?"

Let me take an example from 14th amendment equal protection litigation. We left that matter to the courts. That is one of the troubles with the 14th amendment, The Congress of the United States did not, in fact, define, as it was entitled to do under the fifth and concluding section of the 14th amendment, the privileges and immunities of citizens of the United States. We then had about a hundred years of indecision with respect to the meaning of the 14th amendment. And I would submit that this is a bad example for the advocates of the ERA to point to, because that set back the cause of racial equality in this country a long, long time.

But even so, here is the equal protection clause of the 14th amendment. What does it mean? Does it mean what the court said in 1896, in *Plessey* v. *Ferguson*, or does it mean what the court said in 1954 in the case of *Brown* v. *the Board of Education of Shawnee County, Kansas?* What does it mean?

Well, it seems to me that Senator Tsongas is saying:

> We will leave this matter to the court and I, who have not been able to make up my mind on this, will be satisfied with any answer the court gives. Military draft for women—whatever the court says; Wellesley—whatever the court says.

I think that is improper. I think it shows a certain disrespect for the Constitution of the United States. One further point on that: this Congress has an obligation to the people of the United States from whom the Constitution comes. The Constitution does not come out of this legislative body; it comes out of the people of the United States. The people express their opinion with respect to this and their considered judgment of this when, in the States, they vote on the question of the ratification to the Constitution.

The people of the United States should know what it is they are putting into the Constitution, and this body and the House, on the other side of the Hill, has an obligation to be specific as to what it is the people of the United States are going to do to the Constitution, whose authors they are.

Thank you.

[Prepared statement follows:]

PREPARED STATEMENT OF WALTER BERNS

I must say at the outset that I agree with the effort to abolish all statutes, ordinances, and regulations that discriminate against women. As someone who has taught constitutional law for thirty years, it has always seemed to me that the Supreme Court's decision in Bradwell v. State of Illinois (16 Wall. 130[1873]), upholding the right of Illinois to exclude women from the practice of law, had to be ranked, if not, like Dred Scott v. Sandford, among the most pernicious decisions ever to come down from that Court, then, surely, among the least enlightened. It is astonishing now to notice that only one member of the Court (Chief Justice Chase) saw fit to dissent in that case and that even he was too timid to write an opinion. But, as the cigarette ads say, we've come a long way since then.

In fact, we've come a long way since 1972 when the Congress first proposed this amendment in this form. At least sixteen states now have constitutional provisions similar to the proposed ERA; Title VII of the Civil Rights Act of 1964 has been used effectively to extend the right of women to equal employment opportunity; and, in a handful of Fourteenth Amendment-equal protection cases, the Supreme Court has invalidated state-based discriminatory provisions. In this connection, it is of interest to note that one of the subjects debated here in 1970 had to do with the right of young women to be accepted as students in the service academies at Annapolis and West Point. A policy that then seemed ill-advised to many has since been implemented to the satisfaction of almost everybody.

My opposition to this proposed Equal Rights Amendment is limited to its ambiguous wording: I don't know what it means--or, to state my objection more precisely, there is no agreement as to what it means. In fact, I would wager that a survey of congressional opinion would disclose that there is no agreement here as to what it means, not even among the resolution's co-sponsors. It speaks of equality of rights without identifying those rights. In this respect it should be compared with Article I, section 8, where Congress is

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*Resident Scholar, American Enterprise Institute; Professorial Lecturer, Georgetown University.

authorized to secure for limited times the "exclusive right" of authors and inventors to their respective writings and discoveries, and with the Nineteenth and Twenty-sixth Amendments which specifically protect the right to vote. Such specificity is lacking in S.J. Res. 10. If adopted, it would be the only provision in the Constitution bestowing or protecting a right without identifying the right.

It might, of course, be said that identification is unnecessary; that the language, being absolute in its terms, permits no exceptions or qualifications; that it means that the rights enjoyed by men cannot be denied to women or, conversely, that the rights enjoyed by women cannot be denied to men. That is to say, as drafted, this constitutional language forbids all laws, federal as well as state, that classify by sex. But I know of no one who in fact favors this interpretation, not even the authors of that landmark article in the Yale Law Journal.[1] They say the "constitutional mandate must be absolute," but they don't really mean to say that all gender classifications must be forbidden. Their constitutional amendment would permit laws taking account of physical characteristics unique to one sex or the other--for example, laws respecting wet nurses and sperm banks.[2] It would also permit laws resting on some other constitutional right, such as the right to privacy.[3] (This was intended to reassure those opponents of the ERA who feared that its adoption would outlaw the separation of the sexes in public restrooms.) Thus, while insisting that the mandate must be absolute, they would permit exceptions which they call qualifications. Is this what the co-sponsors of S.J. Res. 10 mean? I don't know and, I submit, neither does this committee.

Other supporters of the proposed amendment are even less absolutist in their reading of its terms. Generally speaking, their intention is to make sex, like race, a suspect classification, suspect--and therefore harder to justify--but not absolutely forbidden, or suspect and therefore subject to a stricter judicial scrutiny. What this implies is that it is not necessary to know what the language means because in due course the courts will tell us what it means, and that it is altogether proper to delegate this authority to the courts. If this is the intention of S.J. Res. 10, I would ask its co-sponsors whether they are willing to accept any meaning the courts give its language. If so, I would charge them with treating the Constitution with contempt; if not, I would ask them to point to the standard on the basis of which they could charge the courts with having misinterpreted the language.

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[1] Barbara A. Brown, Thomas I. Emerson, Gail Falk, and Ann E. Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," The Yale L.J., vol. 80 (April 1971), pp. 871-985.

[2] Ibid., p. 894.

[3] Ibid., p. 901.

If it is said, as it was when the ERA was last debated here, that the courts will be guided by "legislative history," I would reply that what is being debated here is not a piece of legislation. It is a constitutional provision, and the Constitution does not derive from or come out of the legislature. The Constitution derives from the people in their sovereign capacity; as Hamilton made clear in Federalist 78, it is an expression of the people's will, and it can be amended only by a "solemn and authoritative act" of the people. That it is the people (and not the courts or the Congress) that may so act was described by Hamilton as the "fundamental principle of republican government." By Article V, Congress is authorized to propose amendments to the Constitution, but it is the people, acting through their representatives in the state legislatures or in the state conventions, who adopt amendments. And they ought to know what it is they are adopting. Or, they ought to know, and to know precisely, what it is they are being asked to adopt. Are the co-sponsors of S.J. Res. 10 willing to say to the people of the United States that by adopting this constitutional amendment they would be making sex a suspect classification, that they cannot be sure as to what that means, but that, in due course, the courts will let them know what that means?

Let me be more precise. Are the co-sponsors willing to say to the American people, "We don't know whether this amendment will invalidate a male-only draft, but, not to worry, the courts will tell you"? That we haven't been able to agree as to whether the states would still be entitled to require separate dormitories in their colleges and universities, but that in time the courts will decide, and that if they can't come to a common decision, a majority of the Supreme Court will settle the matter? That, truth to tell, some of us are of the opinion that the ERA will outlaw separate junior high schools, one for boys and one for girls, and that others--that is to say, other co-sponsors--are of the opinion that it will not outlaw them, but you the sovereign people of the United States ought not to let that bother you? That we all agree that Congress is already entitled to withhold financial support from private schools that segregate on the basis of race, but we haven't been able to make up our minds as to whether the ERA will require Congress to withhold it from private schools that segregate on the basis of sex? That most of us are persuaded that the courts are already authorized to grant affirmative relief in order to remedy the effects of past racial discrimination--for example, most of us believe that benign racial quotas are acceptable--but we are not sure about benign sex quotas, but, again, we are content to allow the courts answer that question, and answer it one way or the other? That we confess that we never thought about the issue of sex entitlements similar to racial entitlements--that is to say, whether the right of women to vote will now be equivalent to the right of a racial minority to vote which, as we all know, now includes the right to be represented by a member of that racial group? (Or, to be more accurate, we haven't thought about whether a gender group's right to vote can, like a racial group's, be "diluted" when the group is not sufficiently represented.) That--and this will be my last example--we have not wondered as to the effect of the ERA on what might be called the second-generation abortion cases, but we are delighted to leave that issue to the courts?[4]

I said at the outset that I am opposed to laws that discriminate against women, and I meant what I said. I also said that, even without an Equal Rights Amendment, we have made considerable progress toward the complete elimination of such laws; but I did not mean to suggest that we had succeeded in eliminating all of them. There is still work to be done. But to do that work does not require a constitutional amendment. All vestiges of discrimination can be eliminated by simple legislative enactment, many of them by acts of Congress. If, for the most obvious example, it is the will of Congress to draft women as well as men into the armed forces, thereby putting an end to a practice that discriminates against men, Congress need only say so. (And if the President vetoes the measure, it is clear from the number of co-sponsors of S.J. Res. 10 that the veto will be overridden.) And if the legislatures of the 35 states that, during the 1970s, ratified the ERA are truly determined to abolish single-sex public schools, equalize the laws respecting prostitution (by providing for the punishment of the men who purchase the services of the women), abolish maximum hour laws for women, and so on, they need only say so. And it is difficult for me to believe that the remaining fifteen states could long sustain their isolation from what would then appear to be a national public opinion in favor of equality of treatment. I urge you to leave the Constitution alone.

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[4] According to Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), a husband may have a "deep and proper concern and interest... in his wife's pregnancy and in the growth and development of the fetus she is carrying," but, in the event of a conflict, his interest must give way to a wife's right to have an abortion. Read literally, the ERA would convert his interest into a right, a right equal to the wife's.

Contrary to what is sometimes said, it is not a "sexist" document. It is in fact remarkably free of references to gender. Not one of its provisions had to be changed before a woman could serve in House or Senate or on the Supreme Court, or would have to be changed to allow a woman to be elected President. Not one of its provisions had to be changed before women could vote. The Constitution may not be perfect, but it is a better document now than it would be with this ERA.

That amendment should be labeled a judiciary act, an act extending the jurisdiction of the federal courts, an act inviting the courts (and ultimately the Supreme Court) to decide the particular issues that members of Congress would appear eager to avoid. It would of necessity foster still more judicial activism, and I am no friend of judicial activism. Unlike the friends of judicial activism, I do not believe that the good judge is one who asks himself what is good for the country and then seeks "to translate his answers to that question into constitutional law."[5] Officials with the power to decide "what is good for the country" are officials that I want to be able to vote out of office when, in my judgment, they decide wrong. This, I close by saying, was also the desire of the Framers of the Constitution.

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[5] Kenneth L. Karst, "Invidious Discrimination: Justice Douglas and the Return of the 'Natural-Law-Due Process Formula,'" U.C.L.A. Law Review, vol. 16 (June 1969), p. 720.

Senator HATCH. Thank you, Dr. Berns.

Let us turn to you, Ms. Tucker. You state in your testimony that there are still laws which "sanction inequality." Now, I would like you to describe several of these laws which exist at the Federal level, if you please.

I would like to know what laws you would place in this category. If you could be exhaustive, it would be ideal; if you would like to submit more for the record, we will be happy to keep the record open for you. But give us at least some of your feelings on this matter now.

Ms. TUCKER. On the laws that currently exist at the Federal level?

Senator HATCH. Which "sanction inequality"?

Ms. TUCKER. Which sanction inequality?

Senator HATCH. I am talking about the Federal level now.

Ms. TUCKER. Well, at the State level, they are running rampant, unfortunately. At the Federal level, I think the most obvious ones deal with the military of the ones that are present today. The military is the prime discriminator in employment and in employment training against women.

Only recently, in the areas where women were able to compete for jobs, the administration, by regulation, cut back the number of military occupation specialties available for women.

I think something like over 70 percent of the military jobs currently are denied on the basis of sex to women.

Senator HATCH. Would you have those jobs assigned the basis of numerical equality—in other words, 50-50?

Ms. TUCKER. I would have those jobs given on the most common sense basis that I can think of.

Senator HATCH. But if you have sex as an absolute classification, it may mean a 50-50——

Ms. TUCKER. If we have an absolute standard of review, the way the jobs should be given is that there is no discrimination on the basis of sex. But there may well be decisions made to classify jobs on the basis of who is the best person to do that job.

That is what this amendment is all about, to give people individual treatment, to get rid of the stereotype that they cannot do the job. I think that is the most blatant area of discrimination currently existing in current Federal laws.

Senator HATCH. Now, I would like to pursue with you briefly this idea that under the ERA, you cannot classify by sex, but that you might be able to classify on the basis of some other functional characteristic—for example, the ability to lift heavy weights—and that such a classification would be permissible even if it excluded a disproportionate number of women. Frankly, I doubt such a classification could survive.

Let me read you the statements of several of the leading proponents of the ERA in this regard. Again, Professor Emerson—and I have cited him more than most because the prior sponsors of the ERA in the early days of battle described his as the definitive study on the ERA and incorporated his work in their legislative history. I do not think most ERA proponents would disagree with that even to this day.

Professor Emerson, for example, in his Yale Law Journal article states that, "Admissions tests for the military must be neutral to insure that they do not operate to disqualify more women than men." In other words, he does not really mean that they must be "neutral," but that they have to result in approximately the same numbers of men and women qualifying.

It seems to me that his concept of equal opportunity is straight affirmative action analysis. Would you disagree with that?

Ms. TUCKER. Yes, I disagree with that, Senator. I think the reason is not to say that you should have certain numbers of people in order to show that it is equal. What you have to do is show that an individual is not discriminated against on the basis of sex; that their individual qualifications are taken into consideration.

Senator HATCH. Professor Berns, what do you have to say?

Dr. BERNS. Well, this is another example of where there is disagreement among the leading proponents of the ERA as to what it means. If you are going to continue to ask me these questions, I will answer in the kind of litany, the way Senator Tsongas did. He said turn it over to the courts, and I will say, well, there is another example of this disagreement and it will have to be resolved by the courts. The difference between me and Senator Tsongas on this point is I am not happy with having the courts decide it.

Senator HATCH. Well, neither am I.

Let me just go back to the same point. Barbara Brown, one of the leading authorities on this subject, states in her textbook on women's rights that, "Neutral rules such as tests and physical requirements that exclude a large percentage of women from certain jobs are subject to strict scrutiny because of their 'disparate impact' upon women."

She is not, in my opinion, talking about equal opportunity either, as most people know it. I think she is talking about equal results.

First of all, do you disagree with what she said? And, second, do you disagree with my characterization that I think she is talking more about equal results than about equal opportunity?

Ms. TUCKER. I do not think she is talking about equal results. I think the essence of it is she is talking about equal opportunity. These cases are in the courts right now, Senator, and many of these laws have been struck down, some of them on the basis of a strict scrutiny, others on an "other standards" basis.

The problem is what has been the standard, and my point is that the equal rights amendment will say that sex discrimination is unacceptable under our law, and will tell the courts that that is the standard. They do not need to fool around anymore with all of these varying standards they have had to over the last 12 years.

Senator HATCH. Dr. Berns?

Dr. BERNS. I would agree with that. I certainly think that, at a minimum—and by that I mean if the ERA is not interpreted literally, and I know of no one who advocates a literal interpretation, we will have a gender classification being treated in the same way as a racial classification is now treated, making it a suspect classification requiring strict scrutiny, and so forth and so on.

That, of course, does not answer all our questions because——

Senator HATCH. But it does emphasize the fact that the Supreme Court will be obligated to strictly scrutinize any classification based on sex.

Dr. BERNS. Yes, and that leaves pending these questions, or in a way it does not leave them pending because if the advocates of the ERA are serious in this, meaning that if they intend gender classification to be treated the same way as racial classifications are treated, then that leaves us with this: Just as we cannot have segregation of the schools on the basis of race, we cannot have segregation of the schools on the basis of sex. And down the drain go all the public schools where there is a separate school system for boys and girls, and so forth, and down the drain goes Wellesley College, just as down the drain yesterday went Bob Jones University.

Some of us might lament the one—one of my daughters is a graduate of Wellesley, incidentally—more than the other, but nevertheless that seems to me to be the conclusion.

So, all right, Ms. Tucker and I agree that sex equals race here with respect to the Constitution. Next series of questions—and you have asked them and I have asked them in my paper, and Senator Tsongas did not answer them.

Ms. TUCKER. Senator, may I just respond to one of the statements?

Senator HATCH. Sure. I am going to ask him questions and give you the opportunity to respond.

Ms. TUCKER. You are concerned, then, that if the Supreme Court said that once there is an equal rights amendment—every sex classification, then, would go to the Supreme Court on the basis of a suspect classification.

I would like to point out one thing. Once we have——

Senator HATCH. That is not quite what I said, but go ahead.

Ms. TUCKER. Once we have a standard that prohibits discrimination on the basis of sex, or prohibits a classification on the basis of sex—once we have that kind of standard, the wonderful thing about Americans in their compliance with the law is that you can be sure that, voluntarily, State legislatures, the Federal Government and everyone else will clean house as to that, because we are law abiders.

Now, in those areas where we have questions, of course there will be litigation. But for the first time, we will know that that standard is forbidden and the laws will change without packing the courts full of cases.

The thoughtful issues and many of the issues that you raise today, of course, will have to be decided by the courts; they have to be. We have a mechanism to decide that that has been going on for 200 years; it is finely tuned.

But the fact of the matter is what is going to happen is we will get equality by the mere passage of that equal rights amendments because our citizens will want to comply with that law.

Senator HATCH. I do not think it is quite that simple. Second, I raised the issue, and will raise it throughout these hearings, of whether it is wise, as Professor Berns has raised the issue, to allow the courts to decide all of these very difficult and wide-ranging problems.

Ms. **Tucker**. But, Senator, they are already deciding it. What we are saying is if we pass a law——

Senator **Hatch**. Fine, but today we can mitigate the impact of those decisions with statutes, which we will not be able to do if the equal rights amendment becomes part of the Constitution.

It will create a tremendous morass; even on these anticipated difficulties, nobody sponsoring the ERA can clearly predict what the outcomes are going to be and what we are going to have to face in this country. And that, to me, is a very serious problem with the equal rights amendment.

Ms. **Tucker**. Senator, I have two points.

Senator **Hatch**. Sure.

Ms. **Tucker**. First of all, I have tried to show you today that, in fact, the equal rights amendment will give us more certainty in the courts, and hopefully will lead to less litigation.

Senator **Hatch**. I do not understand that.

Ms. **Tucker**. But your point about the fact that somehow you can change legislation if you make a mistake—I would like to submit that there is a proven record already that there has been a mistake in a constitutional amendment and we repealed one of those.

So, if, in fact, equal protection of the laws leads to the parade of horribles which some opponents of the equal rights amendment fear, then, in fact, at that day, at that time, we should repeal it. But I am saying right now the message from the people is clear. We want equal rights for women.

Dr. **Berns**. I was just thinking, Senator, if I may——

Senator **Hatch**. Go ahead, Dr. Berns.

Dr. **Berns**. I suppose Ms. Tucker was referring to something that I have not said today, and hoped I would not have to say today, and that you have not said today. I refer to this business about single-sex toilets.

Now, if the courts were, in fact, to misinterpret Ms. Tucker, and rule that ordinances requiring separate toilet facilities for men and women are unconstitutional, we could overrule the courts by amending the Constitution. That is her point. Well, I am glad I am not on the committee that would have to draft that exception to the ERA. It would have to take the form, "Nothing in this language means that boys and girls have to go to the same toilet." And I don't want to sully the Constitution of the United States with such a provision.

Senator **Hatch**. Drafting an amendment to clarify any of these problems, may be very difficult to do.

You may recall, Ms. Tucker, that Congress has engaged in extensive debate in recent years on whether or not constitutional civil rights violations will be judged by the so-called intent standard, wherein intent or motivation of alleged civil rights violators is evaluated or by a results or a disparate impact standard where the statistical impact of an action is principally considered.

Now, under the 14th amendment, the Supreme Court has stated clearly that sex discrimination is evaluated by an intent standard. I cite *Massachusetts* v. *Feeney* case, decided in 1979.

Now, many ERA proponents have stated that the results or disparate impact standard is more appropriate under the equal rights amendment.

What is your intention in supporting the ERA, that it be defined in terms of intent analysis or effects analysis?

Ms. TUCKER. Senator, I must say when I came here today, I hoped to enlighten the committee with things that I have knowledge about. I must confess that at this point, I would feel very uncomfortable giving to you an analysis without careful study of that.

Senator HATCH. I understand.

Dr. BERNS. If I may, Senator——

Senator HATCH. Go ahead, Dr. Berns.

Dr. BERNS. That again is a legitimate question that arises precisely at the point when we identify sex discrimination and race discrimination. If the two are to be equated in the law, as there seems to be an agreement here that they would be, then this question of entitlements does indeed arise.

For example, with the Voting Rights Act, you might recall that I testified before this committee on my objections to the amended section 2 that finally was not adopted because of precisely my concern that it would, as you put it, have the effect of embodying the notion of proportional representation.

I would turn to my written statement, which I have not read, where I raised the question about a gender group's right to vote being equivalent to a racial group's right to vote, and whether that right to vote could be diluted when the group is not sufficiently represented.

I mean, that is the situation we are in now with respect to group entitlements. And if the two are to be equated, race and sex, then it seems to me it is at least a question as to whether the proponents of the ERA intend to go as far as the proponents of racial equality have, in fact, gone, and as far as the courts, and I suppose a large part of this country have gone.

For example, benign quotas——

Senator HATCH. Almost any classification has been found to be unconstitutional under the suspect facial standard.

Dr. BERNS. Yes. When Ms. Tucker said that earlier, I started to think of some case where that term was used and where the result was the opposite as she suggested, and I could not think of any.

Senator HATCH. Well, let me just ask you, Ms. Tucker, some of the questions. you heard me ask Senator Tsongas earlier.

Now, what, for example in your opinion, will be the impact of the equal rights amendment upon policies of affirmative action? Let me give you a couple of specific examples. Suppose Congress passed a law establishing a 10-percent set-aside for female contractors on public works projects, which is something we have done for racial minorities. Would such a program be consistent with the equal rights amendment?

Ms. TUCKER. Senator, again I would like to say that this is not my area of expertise. I could venture into my feeling about this, and that is where there is a classification that aids discrimination, as opposed to a classification to eliminate discrimination, that is a factor that will always have to be looked at in the individual case that will come up.

Senator HATCH. Let me ask one that I think is in your area.

Dr. BERNS. May I interrupt, Senator?

Senator HATCH. Sure.

Dr. Berns. If the Congress were to do that, you would be presenting a lesser problem to the Department of Commerce than you did with respect to that set-aside for minorities.

Senator Hatch. So, you are saying it is much more likely under the ERA?

Dr. Berns. Well, no. I am saying that the Commerce Department would have much less difficulty identifying who was a man and who was a woman than it now has in identifying who is an Hispanic and who is an Innuit and who is a black.

Senator Hatch. That is an interesting comment.

What about affirmative action admission programs in which preference is given to men and women to establish what the administrators of a college or a university consider to be a balanced admissions program?

If this were a public university, would such an affirmative action program be constitutional under the equal rights amendment?

Ms. Tucker. I am not trying to dodge these questions, Senator.

Senator Hatch. OK.

Ms. Tucker. I guess I would like to, because these are formal hearings, be able to carefully consider them, as I have been trained to consider them, a little more carefully. I will, again, respond to you, though, that in these kinds of admissions policies, the purpose of the policy, whether it is to eliminate discrimination or whether it is designed to foster discrimination, is one of the factors that has to be looked at on a case-by-case basis.

Senator Hatch. Would you agree with the California Commission on the equal rights amendment that "neither benign nor compensatory aid will be allowable under the absolute interpretation of the ERA, since such programs discriminate against men solely on the basis of sex?"

Ms. Tucker. I think that the equal rights amendment will be as helpful to men as it will be to women. I have not read the California report. I am hesitant to comment on it, but I would be happy to respond to it later.

Senator Hatch. Did you agree with the Commission in the quote that I just read you?

Ms. Tucker. Could you read that last part again?

Senator Hatch. Let me just read that again. They said:

> Neither benign nor compensatory aid will be allowable under the absolute interpretation of the ERA, since such programs discriminate against men solely on the basis of sex.

Ms. Tucker. Well, I am not sure whether they do discriminate against men on the basis of sex.

Senator Hatch. OK. Let me give you one where women have complained that men have the law in their favor. A number of commentators on the ERA have stated that the so-called veterans' preference programs, where we accord preference to veterans in public hiring throughout this country because of the service that they have given, will be unconstitutional under the ERA. Would you agree with that?

Ms. Tucker. Again, this is not my area of expertise, but my understanding is that classifications on the basis of sex would have to be viewed with the idea that there should be no discrimination on the basis of sex under an equal rights amendment.

Senator HATCH. You are familiar that the Women's Legal Defense Fund——

Ms. TUCKER. I am a member of that organization.

Senator HATCH [continuing]. Filed an amicus brief on precisely that issue in the courts?

Ms. TUCKER. I am aware of that, but I myself have not read that. We have many members in the organization, and many briefs.

Senator HATCH. All right. On the issue of abortion, irrespective of our philosophical differences, I want to know what the ERA will do. What would be your view on the impact of the ERA upon Federal, State, and local limitations on public funding of abortions?

Ms. TUCKER. Senator, again, my area of expertise has been in the domestic relations field and I do not think I could lend light to you as you have asked on that.

Senator HATCH. OK. What about the issue of homosexual marriages? Would the ERA render laws against homosexual marriages unconstitutional? That involves your field of domestic relations.

Ms. TUCKER. I am not an expert in the field. I can give you an answer of some facts that might be helpful to you.

Senator HATCH. Sure.

Mr. TUCKER. Of the 16 States that have passed ERA's, 8 States have wording that would be identical to the Federal amendment. In those 8 States, cases have come up through the courts and it is very clear that the issue of sexual preference is not covered in those States.

Senator HATCH. Yes, but if the equal rights amendment is passed.

Ms. TUCKER. But I am saying in the States, which is the only place one can glean experience from——

Senator HATCH. Right.

Ms. TUCKER [continuing]. That have the exact wording, the cases have been in the courts and none of those cases has said that the issue of sexual preference is covered by the equal rights amendment.

Senator HATCH. As I understand it, there has only been one case on that subject, *Singer* v. *Hara*, not several cases. Are you aware of other cases?

Ms. TUCKER. I do not have the names of the cases, Senator. I would be happy to find them for you.

Senator HATCH. I would appreciate that.

The U.S. Commission on Civil Rights has surveyed the entire Federal law to determine changes that would be required by the ERA.

One of their observations was that all college fraternities and sororities at public educational institutions would have to be replaced by what they termed equal admission social societies.

Now, in your view, would the equal rights amendment require the outlawing of fraternities and sororities at public colleges and universities?

Ms. TUCKER. Senator, this is another issue that I have not addressed, nor does my field of expertise address.

Senator HATCH. OK.

Ms. **Tucker**. I think there are a lot of conflicting principles there.

Senator **Hatch**. Dr. Berns?

Dr. **Berns**. Well, my answer would be the same; it is the same as Senator Tsongas' answer. My indecision bothers me; his indecision does not bother him.

Senator **Hatch**. In other words, who knows what in the world the ERA does mean?

Dr. **Berns**. Yes.

Senator **Hatch**. That is the point of your remarks and is of great concern to me.

Dr. **Berns**. Let me reiterate a point that you just brought up on homosexual marriages. The Constitution of the United States is quite clear with respect to laws forbidding miscegenation. We have a decision from the Supreme Court of the United States in *Loving* against whoever it was in Virginia on that particular issue.

I do suppose that this issue will arise, and if the amendment is given its clear meaning, then it seems to me that you are depriving a man of a right to marry a man simply because he is a man, which is a right enjoyed by a woman, and vice versa. How the courts will decide that——

Senator **Hatch**. Well, if it is deemed a suspect classification, much less an absolute one, how else could they decide it?

Dr. **Berns**. Well, that, of course, again is my point. If we are equating sex and race discrimination under the formula of suspect classifications, then here is a question that is going to arise. You anticipated it; I anticipated it. If my memory serves me, *Brown, Falk* and *Emerson* anticipated it back in 1971.

Senator **Hatch**. Prof. Paul Freund anticipated it.

Dr. **Berns**. Paul Freund anticipated it in these hearings in 1972, or whenever it was. It is a question that is going to arise. At a minimum, it seems to me, the cosponsors of Senate Joint Resolution 10 are obliged to tell the people of the United States what they intend by this language with respect to this question.

Senator **Hatch**. The Civil Rights Commission has also concluded that the Boy Scouts and Girl Scouts, which are federally chartered organizations, provide "separate but equal" benefits to boys and girls. The concept of "separate but equal," in their view, would be outlawed by the ERA with respect to the sexes, the same as it is with respect to the races under the 14th amendment.

As a result, the Commission states that "Review of the purposes of these clubs should be undertaken to determine whether they perpetuate sex role stereotypes." Now, under the ERA, could the U.S. Congress continue to grant Federal charters to "separate but equal" organizations, such as the Boy Scouts and the Girl Scouts?

Ms. **Tucker**. I do not have an opinion on it, but I will again say that this is an issue that does need review.

Senator **Hatch**. So the courts will have to decide this as well?

Ms. **Tucker**. The courts will have to decide it, but if we have an ERA, Senator, they are going to have a clearer standard than they do now to decide it.

Senator **Hatch**. They might just abolish the Boy Scouts and Girl Scouts and substitute "person scouts." Is that what you are saying?

Ms. **Tucker**. That could happen, and if that does happen, I do not know if the Nation would be any worse for that, if they decided to do that. [Laughter.]

Senator **Hatch**. Well, I personally think it would be worse, but that may be my Neanderthal thinking process. [Laughter.]

Go ahead.

Dr. **Berns**. Taking account of the disagreements that have, in fact, emerged—disagreements among the proponents of this—the conclusion that I draw from that clearly is that these are questions that are best handled in the discrete fashion of legislation.

A principle applied in one area, say respecting Boy Scouts or homosexual marriages, may not be applicable, in fact, it may have results that Ms. Tucker does not want in another area. Now, I am aware of the fact, as she has pointed out, that to pursue the legislative route may be more laborious than to do it in one fell swoop.

Senator **Hatch**. Sure.

Dr. **Berns**. But the consequence of doing it with one amendment, one swoop, is, of course, to hand these questions over to the courts and then to sit back and say, we will be content—of necessity, we will be content—with whatever answer these five men, a majority of the Supreme Court, give us. And if I may become partisan here, there is a possibility, of course, that Mr. Reagan will, in due course, appoint, a majority of that Court. And then the proponents of the ERA are in the position of saying, "We are perfectly content—I, Senator Tsongas, am perfectly content—to allow Mr. Reagan's Supreme Court to give whatever answer they want to these questions."

Senator **Hatch**. After all, some believe that the judicial branch of Government is the only one that is responsible around here, and perhaps that what we should do is abdicate our responsibilities and let them handle these problems. I think that is what you are saying, is it not?

Dr. **Berns**. That certainly is what I am saying, yes.

Senator **Hatch**. And that is one reason I have always had trouble with the ERA even though I feel very strongly and deeply about women's rights.

I might also just correct you on one point, Ms. Tucker. Boy Scout and Girl Scout organizations are constitutional in law today; they may not be if the ERA is adopted. I think many people would be concerned to learn what kind of extreme determinations could be made pursuant to the equal rights amendment.

Let me ask you this question. Many proponents of the ERA have argued that true equal employment opportunity is not achievable for women until women are fully relieved of the child care burdens.

The Ohio State Task Force on the ERA states, for example, that the ERA would require consideration of a new public policy on the issue of child care and that child care would have to be made available to all families who need such services from the Government, irrespective of their income level.

Now, in your opinion, would the ERA create any sort of constitutional right on the part of individuals to secure the benefit of Government-supported child care services?

Ms. TUCKER. Well, I do not think the ERA creates rights. What it does is it prevents discrimination on the basis of sex. But in terms of the problems of child care, I think indeed the problem of child care in this country is a national disgrace.

I think that people who need child care in this country are not getting it, and that is another problem for another day to address. But because we have a problem in child care, we should not say that we should not have an equal rights amendment or women should be denied equality in obtaining employment because they are needed more at home than they are needed in the work force.

Senator HATCH. That is not what I am saying. Look at what Judge Ruth Bader Ginsburg said in her article on sex bias: "In order to achieve the equality principle of the ERA, the increasingly common two-earner family should impel development of a comprehensive program of Government-supported child care." Do you agree with her?

Ms. TUCKER. I would agree with that. I think that that would be a terrific solution to the child care problem, but I think that that is an independent issue from the equal rights amendment. I think if securing employment for women compels us to address the child care problem that we only address in times of war—if that compels us to do it, fine.

Senator HATCH. Do you have any comments on that, Dr. Berns?

Dr. BERNS. No, sir.

Senator HATCH. OK. Well, I would say this: the Ohio State Task Force on the ERA and Judge Ginsburg seem to think that child care would be elevated to some sort of constitutional right.

Ms. TUCKER. Senator, I hope I get that case to bring before Judge Ginsburg on the U.S. court of appeals.

Senator HATCH. OK. [Laughter.]

Let me ask you this one. The task force of the Virginia attorney general on the equal rights amendment has said about the ERA that under it, "Separate colleges, hospitals, and prisons would have to be sexually integrated. Not only must separate colleges and prisons be abolished, but facilities within those institutions, such as dormitories, would have to be sex-neutral."

This analysis was prepared by Prof. A.E. Howard of the University of Virginia, one of the Nation's most highly regarded constitutional scholars, and presently an advisor to Governor Robb.

Would you agree with this assessment of the impact of the ERA or and would the ERA permit separate but equal college, hospital, and prison facilities?

Ms. TUCKER. Senator, I do not think I could be of any help to you with my answer on that.

Senator HATCH. OK. I would just point out that the California Commission on the ERA has said, "It is only the physical integration of men's and women's prisons that will insure the equality of the sexes which passage of the ERA will affirm as the law of the land. Allowing the doctrine of separate but equal to exist under the ERA will, in fact, only serve to perpetuate unequal physical facilities provided by the State for the sexes."

Do you disagree with that, or you just do not know?

Ms. TUCKER. I do not know.

Senator HATCH. OK. Professor Berns, do you disagree with it?

Dr. BERNS. I have no comment on it.

Senator HATCH. Would churches continue to be allowed tax exemptions and other public benefits under the ERA if they do not allow women to hold the priesthood or otherwise participate equally with men in the rituals or theology or functioning of the church?

Ms. TUCKER. Senator, that is a terribly complicated and complex constitutional problem.

Senator HATCH. It sure is.

Ms. TUCKER. I do not think I could be of any help to you on that.

Senator HATCH. Personally, though, do you agree with the resolution of the National Organization for Women that I read earlier? Are you a member of NOW?

Ms. TUCKER. As a matter of fact, I am not a member of NOW.

Senator HATCH. OK.

Ms. TUCKER. But that is not because I disagree with them.

Senator HATCH. I was not trying to embarrass you. [Laughter.] We are going to have order in this room. I do not care which ideological side you are on in this matter. We are going to show the witnesses and we are going to show Senators the same due respect. Frankly, I think we have had just a few too many outbursts, so let us just try and get into this as best we can and look at both sides.

We have got the best people we know of right here today, and we will have others who are experts in this area. I think it is good to show due deference to everybody.

The National Organization of Women has approved the following official resolution:

> Resolved, (1) that churches and seminaries immediately stop their sexist doctrines that assign a different role to men and women; (2) that seminaries recruit, enroll, financially aid, employ, and promote women theologians and theological students on an equal basis with men; (3) that Federal statutes be amended and enforced to deprive churches of their right to discriminate on the basis of sex; and, (4) that tax exemption be withdrawn from any church actively opposed to abortion or ordaining women to the ministry.

Do you agree with that or disagree?

Ms. TUCKER. Senator, I cannot give you a comment on that. That is a very complicated resolution, and that is the first time I have seen that resolution.

Senator HATCH. OK. Let me ask you this one.

Dr. BERNS. May I offer an opinion on that?

Senator HATCH. Yes, go ahead.

Dr. BERNS. This, of course, is merely an opinion. If the ERA is adopted and becomes part of the Constitution, that resolution from NOW will, in fact, be adopted by the courts. I suspect that to be the case.

Senator HATCH. So you suspect that the Catholic Church, if it continues not to ordain women priests, could lose its tax exemption?

Dr. BERNS. Yes. The suspicion is based on my understanding of the winds of doctrine that are moving through this country now, and there is a much stronger impetus behind one than there is behind the other.

What bothers me about that, of course, is that I may or may not agree to take communion from a woman priest, for example. I am an Episcopalian. But I do strongly support the right of a church to answer that kind of a question for itself. It seems to me that that is not a question that is properly answered by political forces, if you will.

Senator HATCH. I agree.

Dr. BERNS. I would have thought that the first amendment of the Constitution settled that one in favor of the churches long ago.

Senator HATCH. How do you think the *Bob Jones University* decision affects that?

Dr. BERNS. Well, when I said I suspect that NOW's opinion will be adopted by the courts, I had in mind, of course, such things as the *Bob Jones* situation, when only one member of the Court, in a sense, took into account the principle of religious freedom.

Senator HATCH. Ms. Tucker, Sylvia Porter, the nationally syndicated columnist, who is also a supporter of the ERA, has written that when finally passed it will require the adoption of a homemaker tax in order to insure——

Ms. TUCKER. I did not hear that, Senator.

Senator HATCH. I am sorry, excuse me; she has written that the ERA when finally passed will require the adoption of a homemaker tax in order to insure that housewives or househusbands are treated fairly under Social Security.

Under this proposal, proposed originally by the International Women's Year Conference in 1975, the homemaker would be treated either as an independent contractor or an employee of the spouse working outside the home. The spouse working outside the home would be subject to Social Security taxes in order to insure that the homemaker was independently entitled to Social Security benefits.

Would you agree with Sylvia Porter? Would the ERA constitutionalize the requirement of some sort of additional Social Security tax on a working spouse so that the homemaking spouse—the employee, as it were—could accrue Social Security benefits? Would this be constitutionally required under the equal rights amendment?

Ms. TUCKER. I do not know if I can answer it that specifically, but I will say that the discrimination——

Senator HATCH. What is your opinion?

Ms. TUCKER. The discrimination on the basis of sex that currently exists in the Social Security laws would have to be changed. The ERA would mandate it.

Senator HATCH. Yes, but what about that specific problem?

Ms. TUCKER. As to a homemaker tax and as to covering the homemaker under Social Security, I personally think that is a wonderful idea, and I think it is a wonderful idea because I deal with my clients every day, with 50-year-old women whose husbands leave them, who are given pittance for alimony. A large percentage of them never see it again, and they are left in their elderly years with nothing.

Social Security laws that would require their work to be recognized as valid, wage-earner work in the home should be changed to allow them to be covered.

Senator HATCH. What you seem to be saying is that you personally feel that the spouse working outside the home ought to pay into the Social Security system for the spouse doing the work at home.

Ms. TUCKER. The specifics of the system, Senator—I think I would not be the best person to talk about the best way to implement it.

Senator HATCH. But, do you personally feel that way?

Ms. TUCKER. But my personal feeling is, with the limited knowledge I have, that I think these women as homemakers, or men as house husbands, as you call them, should be given the protection and payment in their old age for work performed during their marriage, yes, sir.

Senator HATCH. OK. You are an expert on property law. Several commentators on the equal rights amendment have stated that the 40-or-so States which have adopted the common law concept of separate property would be required to adopt a community property system similar to that adopted by several western States.

In fact, Barbara Brown in her textbook states that common law property notions "violate equal rights principles." The California Commission on the ERA describes this reform as being "one of the most important reforms to take place ever in American law," although even this may not be enough to fully satisfy the ERA."

Would the ERA render systems of property ownership that rely on title or direct financial contributions—the common law property concept—unconstitutional, in your opinion?

Ms. TUCKER. I would like to answer the question this way. I think the common law notions that used to follow whoever paid for the property or whoever had title got the property, which several States still have, by the way, and community property which is based in the idea of a community of the family—that both parties, whether they are working in the home or outside the home, have contributed to the community—both of those laws would be under scrutiny from the ERA.

The community property States, although they have the concept of recognizing the equal contribution of the homemaker in terms of obtaining a piece of the marital pie—those State laws have a lot of vestiges of sex discrimination.

For instance, the men are allowed to control the property whether or not the wives might have been the ones that bought the property.

So, those laws would be struck down.

In terms of the equal rights amendment's effect on the common law notion, I think it will go to the fact that you recognize the homemaker's contribution as being a currency of equal worth to the dollar that the other spouse outside the home brings in.

Senator HATCH. But many of those laws have already been stricken down in the States under the equal protection clause. What I was asking is would common law principles of title and title transfer be stricken down as unconstitutional under the equal rights amendment?

Ms. TUCKER. If they are sex-based classifications, they would be stricken, yes, sir.

Senator HATCH. Well, are they sex based? If they are not community property laws, would they be sex based, in your opinion?

Ms. TUCKER. If it is merely a title law, I do not think they would be covered by the equal rights amendment.

Senator HATCH. OK. Now, let me ask you just a couple of questions about the military which I asked Senator Tsongas.

Do you believe that the equal rights amendment would result in the overturning of the Supreme Court's decision in *Rostker* v. *Goldberg* that Congress can limit draft registration to men? Would that be overturned?

Ms. TUCKER. Senator, I am not an expert on the military.

Senator HATCH. You did discuss it in your paper, however.

Ms. TUCKER. Yes; but I will attempt to answer it in saying that I believe the registration system and the draft system should not discriminate on the basis of sex. In fact, with the registration system, all men are required to register whether they are blind or lame, and no women are required to register.

Senator HATCH. You would require it of women, then?

Ms. TUCKER. Yes, I would.

Senator HATCH. OK. Second, would the ERA result in women being assigned to combat units and related duties on the identical basis as men?

Ms. TUCKER. I believe I answered that before. I believe the assignment to combat duties is based on a commonsense classification of who is the best person to do the job. And if a woman can shoot a gun better and is able to be in combat, more power to her.

Senator HATCH. In a Yale Law Journal article entitled "ERA and the Military," the following quote appears: "High physical standards or skill requirements which eliminate a large portion of women might also be challenged as unnecessarily restrictive at a time when 85 percent of military jobs are noncombatant." Do you agree with that?

Ms. TUCKER. I did not hear the last part.

Senator HATCH. "High physical standards or skill requirements would be stricken at a time when 85 percent of military jobs really are noncombatant."

Ms. TUCKER. I do not understand. The high physical standards—are they in the noncombatant jobs?

Senator HATCH. What?

Ms. TUCKER. Are the high physical requirements in the noncombatant jobs? Is that what you are saying?

Senator HATCH. Well, across the board in the military, 85 percent of our people in the military are in noncombatant posts right now.

Ms. TUCKER. Yes.

Senator HATCH. Now, where the military require skill requirements and physical standards, would they be stricken unless there were approximately equal results.

Ms. TUCKER. I do not think they would equalize the standard. I think what it would do would prohibit a general classification, saying anyone who can meet the strenuous standard can be allowed to take that position. It would require that interpretation.

Senator HATCH. Then you would disagree with that article in the Yale Law Journal that stated that they would be prohibited?

Ms. TUCKER. That they would be prohibited?

Senator HATCH. That they would be prohibited.

Ms. Tucker. I do not know on what basis they are prohibiting.

Senator Hatch. OK.

Ms. Tucker. I think the equal rights amendment would say that women as well as men can compete for those jobs, and if they can do it, they should get it.

Senator Hatch. Dr. Berns, do you have any comments on these military questions?

Dr. Berns. Well, I would agree with much of what Ms. Tucker said. I suspect, however, that the physical capacity to perform a job is not the only criterion that the military uses when it assigns personnel around the world.

As someone who floated around much of the world for over 4 years on a naval vessel, I am very much aware of the fact that there were no women on that naval vessel, much as I might have wanted them on occasion.

Senator Hatch. OK. Ms. Tucker, as an expert in domestic relations law, let me just ask you a few questions about the ERA vis-a-vis domestic relations law.

First, would laws which place primary responsibility upon the male for either family support or child support be in violation of the ERA?

Ms. Tucker. If the laws placed primary support on the male?

Senator Hatch. Primary responsibility, yes.

Ms. Tucker. Yes, they would be in violation.

Senator Hatch. Would laws establishing a presumption that a child takes the surname of its father be in violation of the ERA?

Ms. Tucker. I had not thought about that question, Senator. I am unaware of any law which requires it. It is the common law that is usually followed.

Senator Hatch. Most States do have laws that require the child to take the surname of the father.

Would those laws be challenged as unconstitutional?

Ms. Tucker. I suspect they would be challenged, sir; yes, I do.

Senator Hatch. Do you think that under the ERA, they would be stricken?

Ms. Tucker. I venture not to give you an answer to that. I think they would be challenged. I would like to think about that one some more.

Senator Hatch. OK. Would laws that grant a husband a divorce if at the time of marriage he was unaware of the pregnancy of his wife by another man be in violation of the ERA? [Laughter.]

Now, we are going to have order in here.

Ms. Tucker. I think any laws, grounds, or statutes for divorce that are sex based would fall.

Senator Hatch. And that one would fall?

Ms. Tucker. Yes that one would fall.

Senator Hatch. Would existing alimony or child custody awards that were given under pre-ERA non-sex-neutral statutes be opened up at the time of passage of the ERA?

Ms. Tucker. There were too many negatives in that. I did not—

Senator Hatch. Let me do it again. Would existing alimony or child custody awards that were given under a non-sex-neutral statutes be opened up by the ERA? Would such continuing decrees be opened up?

Ms. **Tucker**. I think it should be known that alimony and child support awards are always open to the court under existing law——

Senator **Hatch**. I agree.

Ms. **Tucker** [continuing]. On the basis of a major change in circumstances.

Senator **Hatch**. So, the ERA would be a major change?

Ms. **Tucker**. If the ERA is determined to be a major change in circumstance, I would say that indeed those laws might be opened up. And if that means that women can come in and get increased child support awards because their contribution was not recognized before, I am all for it.

Senator **Hatch**. Would you agree with Barbara Brown's textbook ERA that, "The use of fault as a factor in alimony and support awards would be unconstitutional under the ERA because they have a disparate impact upon women?"

Ms. **Tucker**. Senator, I think the use of fault is disappearing on a State-by-State basis now anyway.

Senator **Hatch**. Would it be required to disappear?

Ms. **Tucker**. I am unsure whether fault is a sex-based classification or whether the disparate impact would be the standard to apply to that.

Senator **Hatch**. OK. Would State laws against the recognition of common law marriages be in violation of the equal rights amendment? Some ERA commentators have argued this.

Ms. **Tucker**. Could you repeat that?

Senator **Hatch**. Would State laws against the recognition of common law marriages be in violation of the equal rights amendment?

Ms. **Tucker**. I do not have an answer for that, Senator.

Senator **Hatch**. OK. Would you agree that the traditional marriage contract in this country would be sharply redefined by the ERA? The California commission says it would be.

Ms. **Tucker**. I do not know what the traditional marriage contract is, Senator.

Senator **Hatch**. OK. Would you agree with the Civil Rights Commission that—

Ms. **Tucker**. Could you tell me? I would like to try to answer that question.

Senator **Hatch**. It involves assumptions about the respective roles of the husband and wife in the martial relationship. I am not going to get into that thicket, either. [Laughter.]

Would you agree with the Civil Rights Commission that:

> The present legal structure of domestic relations represents the incorporation into law of social and religious views of the proper roles of men and women with respect to family life, and that such deeply embedded stereotypes would be addressed by the ERA?

Ms. **Tucker**. I hate to ask you this again, but could you repeat that again?

Senator **Hatch**. Sure. The Civil Rights Commission has said that:

> The present legal structure of domestic relations represents the incorporation into law of social and religious views of the proper roles of men and women with respect to family life, and that such deeply embedded stereotypes would be addressed by the ERA.

Ms. **Tucker**. I agree with that.

Senator **Hatch**. OK. I have a number of other questions, but I think I have already asked an awful lot. Let me just go to Dr. Berns for a question.

Dr. Berns, what do you mean in your testimony when you state that the ERA is the "only provision in the Constitution bestowing or protecting a right without identifying that right?"

Dr. **Berns**. Well, in my statement I referred to other examples of where the word "right" or "rights" is used. For example, the one usage of the word "right" or "rights" in the unamended Constitution is to be found in article I, section 8, where the right referred to specifically is the right of authors and inventors.

And then among the amendments, for example, the 15th, 19th, and 26th use the word "right" or "rights," and identify it specifically as the right to vote in each of these cases. That is what I had in mind.

In this particular case, what we have here is a statement, "Equality of rights under the law shall not be denied," and so forth, and the question is what rights?

Senator **Hatch**. Do you have any comments on that, Ms. Tucker?

Ms. **Tucker**. I think I addressed them in my main testimony.

Senator **Hatch**. OK, I think you did, also.

I have kept you both too long. Let me just personally thank you for the testimony you have brought to this committee, for the efforts that you have put forth, and for the candor that both of you have expressed before this committee.

I respect both of you and I think you both have proven enlightening. So, I am grateful that you would take time out of busy schedules to be here. Thank you for coming and we will go to our last witness now.

Ms. **Tucker**. Thank you, Senator.

Dr. **Berns**. Thank you, Senator.

Senator **Hatch**. Thank you.

Our final witness today is the distinguished Representative from Illinois who has appeared before this committee before, Representative Henry Hyde. Henry Hyde, besides being a respected member of the House Judiciary Committee, is also the author of the so-called Hyde amendment, limiting public funding for abortions, an issue which has already been implicated in the present debate.

We are very glad to have you here, Congressman Hyde, and we will look forward to taking your testimony at this time. Go ahead, Congressman Hyde.

STATEMENT OF HON. HENRY J. HYDE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. **Hyde**. Thank you, Senator. I welcome this opportunity to testify before you and your committee, and I commend you for your endurance.

I am going to confine my testimony to one aspect of the ERA, and that is the relationship between abortion and the ERA, There are many other aspects, as you have indicated in your questioning of the previous two witnesses about ERA. But I will confine my testimony to the abortion connection.

First of all, is there a connection between the proposed equal rights amendment and abortion or abortion funding? Logically, there should be no connection, but as Justice Holmes has reminded us, the life of the law has not been logic; it has been experience. And recent experience suggests that the ERA, if it is proposed and ratified without an explicit provision against its use as a proabortion device, will, in fact, be used to sweep away the minimal protection of unborn children that the courts currently allow, and also to mandate tax funding for abortions.

Law, including constitutional amendments, should be interpreted in accordance with the intentions of those who wrote and adopted them. Some of the most important supporters of the ERA have argued and stated publicly that they regard restrictions on abortion, and even the refusal of legislatures to finance abortions, as a form of sex discrimination. And judges, including some Justices of the U.S. Supreme Court, have given reasons to believe that they will be receptive to such arguments.

One important source of evidence about how the ERA would be interpreted is litigation under the State equal rights amendments in various State constitutions. In several recent controversies involving State ERA's, it has become clear that the proabortion movement regards ERA as a valuable tool in the fight against abortion funding restrictions.

In the 1978 case of *Hawaii Right to Life* v. *Chang*, a group of doctors argued that they had a constitutional right to be paid for abortions with State funds. The abortionists were represented by the American Civil Liberties Union, which has been prominent both in the proabortion and the pro-ERA causes.

They argued that the State ERA secured a right to abortion funding because—

> Abortion is a medical procedure performed only for women. Withdrawing funding for abortions while continuing to reimburse other medical procedures sought by both sexes or only by men would be tantamount to a denial of equal rights on account of sex.

In the 1980 case of *Moe* v. *King*, the Massachusetts affiliate of the ACLU urged that the State's highest court hold that—

> By singling out for special treatment and effectively excluding from coverage an operation which is unique to women, while including without comparable limitation a wide range of other operations, including those which are unique to men, the statutes constitute discrimination on the basis of sex, in violation of the Massachusetts Equal Rights Amendment.

In the 1983 Pennsylvania case of *Fischer, Planned Parenthood, et al* v. *Department of Public Welfare*, the American Civil Liberties Foundation of Pennsylvania argued that it is unconstitutional under the Pennsylvania State ERA to deny State tax funds for abortions because, "Pregnancy is unique to women," citing sections of the Pennsylvania Code which expressly deny benefits for health problems arising out of pregnancy, "discriminates against women recipients because of their sex."

Citing other sections of the statute—

> The regulations issued pursuant thereto constitute a gender-based classification in violation of the Pennsylvania Equal Rights Amendment, Article I, Section 28, of the Pennsylvania Constitution.

Now, these Hawaii, Massachusetts, and Pennsylvania cases were decided on other grounds, albeit favorably to abortion funding. The argument advanced by the abortionists in all three cases, however, is firmly grounded in past decisions of the U.S. Supreme Court.

The Court's holdings have denied the constitutional right to a Government-financed abortion on the ground that poor women who desire abortions are not within any of the so-called suspect classes against whom no law can discriminate without triggering strict scrutiny by the courts.

Strict scrutiny almost always results in the laws being struck down as unconstitutional. If either sex or poverty had been designated by the Court as a suspect classification, then the Court would almost certainly have found a right to abortion funding.

Since 1970, the ERA advocates have emphasized that the amendment's principal legal effect would be to make sex a suspect classification under the Constitution. The most important suspect classification at present is race. If sex discrimination were treated like race discrimination, Government refusal to fund abortions would be treated like a refusal to fund medical procedures that affect members of minority races.

Suppose that the Federal Government provided funding for procedures designed to treat most diseases, but enacted a special exclusion for sickle cell anemia, which affects only black people. The courts would certainly declare that exclusion unconstitutional.

Other laws regulating abortion would be treated similarly. Conscience clauses, for instance, which give doctors and nurses in State-supported institutions the right to refuse to participate in abortions, would be treated like laws giving State officials the right to deny services to blacks but not to whites.

Nor would it avail the State to plead that abortion deserves special treatment because of the interests of the unborn child. The Court's decision in *Roe* v. *Wade* expressly declared that argument impermissible, at least where a woman is seeking an abortion during the first 6 months of her pregnancy.

It should be remembered that the abortion funding cases were decided by a divided Court. A shift of two votes in the 1977 cases or of only one vote in the 1980 case would have resulted in a Supreme Court order that abortions be funded on the same basis as other operations.

Unless abortion-related cases are clearly and explicitly excluded from the scope of the ERA, this constitutional amendment making sex a suspect classification would provide the ACLU and other proabortion litigants with the argument they need to persuade the crucial Justice.

Some of the principal architects of the ERA have been vague or silent about the effects of the amendment on issues such as abortion funding. One reason for this is suggested by the newsletter of the Civil Liberties Union of Massachusetts, explaining the organization's decision to argue the connection between abortion and the ERA: "The State equal rights amendment provides a legal argument that was unavailable to us or anyone at the Federal level. The national equal rights amendment is in deep trouble. It was our hope to be able to save Medicaid payments for medically necessary abortions through the Federal court route without having to use the equal rights amendment and possibly fuel the national anti-ERA movement. But the loss in *McRae* was the last straw. We now have no recourse but to turn to the State constitution for the legal tools to save Medicaid funding for abortions."

If a Federal ERA were ratified, there would be no need for silence or evasion, so we would see all laws regulating abortion challenged vigorously on the argument that they are unconstitutional discriminations against women.

In the meantime, many of those that are committed both to abortion and to the ERA will continue to avoid discussing the connection. A particularly egregious example of one frequently encountered evasive tactic is found in the conflicting statements of Prof. Thomas Emerson of Yale Law School, the coauthor of a 1971 article in the Yale Law Journal that is frequently cited as the authoritative guide to the amendment's legal effects.

Let me inject a parenthetical remark. I remember from that article a sentence on women serving in the military, and he said we will have to radically restructure our view of women in the military. If a woman can pass a physical and carry a 50-pound pack, there is no reason in the world she cannot serve in combat with men. I remembered that, if nothing else, from his article.

Testifying before the Connecticut Legislature, Professor Emerson said:

> The ERA has nothing to do with the power of the states to stop or regulate abortions, or the right of women to demand abortions. The state's power over abortions depends upon wholly different constitutional considerations, primarily the right of privacy, and would not be affected one way or the other by passage of the ERA.

But in a letter written in 1974, Professor Emerson took a different view:

> I think that the ratification of the equal rights amendment, while it would not affect the abortion situation directly, would indirectly have an important effect in strengthening abortion rights for women.

Professor Emerson gave a hint about the nature of this indirect effect in a brief he filed with the U.S. Supreme Court in *General Electric* v. *Gilbert*, in 1976, along with the other coauthors of his 1971 ERA Law Journal article.

Urging the Court to hold that a pregnancy exclusion in a health insurance plan violated federal laws against sex discrimination, these pro-ERA scholars stated that if the ERA were ratified, pregnancy-related classifications would be "subject to strict scrutiny," and that State laws discriminating against women with "disabilities related to pregnancy and childbirth would not survive the scrutiny appropriate under the amendment."

Thus, according to Professor Emerson and his coauthors, the Supreme Court's right to privacy may be sufficient to secure a right to abortion, but if the ERA is ratified, the right to privacy will no longer be necessary as a basis for abortion-related constitutional claims.

Indeed, the ERA will then provide a basis for striking down all laws that discriminate against pregnancy-related disabilities, the most important of which are the abortion funding restrictions and other abortion regulations that have survived challenges based on the right to privacy.

Among the lawyers who joined Professor Emerson and his coauthors in their brief on pregnancy-related disabilities was Ruth Bader Ginsburg, who was then the preeminent legal scholar of the ERA movement and who is now a Federal judge.

This is significant not only because it shows that the ERA movement's scholars and advocates are virtually unanimous in their belief that ERA will ban pregnancy-related discrimination, but also because it reminds us of who will be interpreting the ERA.

It is not logically necessary that the Federal judiciary hold restrictions on abortion unconstitutional under the ERA. But it was not necessary—indeed, it was palpably, grotesquely incorrect—for the courts to create a constitutional right to abortion in the first place.

In 1973, the Federal judiciary found a right to abortion as a corollary of a right to privacy that is not even mentioned in the Constitution. The judiciary is quite capable of finding an even broader right to abortion and abortion funding in the ERA, whose advocates have already provided the arguments for such a right. Congress should not give the courts this opportunity.

Supporters of the ERA have said that an amendment which expressly excludes its application to abortion is unacceptable to them. One is left to ask why. A question has been raised about the possible effects of a constitutional amendment being considered by Congress. This is a serious question about an important question of public policy.

Those who argue that pro-life people must prove that the ERA will enhance the right to abortion are misallocating the burden of proof. Nobody can prove what the judges will do with the amendment. As legislators, however, it is our responsibility to answer the questions that we can answer, rather than leaving the judiciary free to choose whatever answers the judges like.

I can only explain the resistance to the insertion of clarifying language in the ERA as additional evidence that many of its proponents do intend to use it as a tool in the abortion struggle.

Indeed, in February 1983 the sponsors of a proposed State ERA in Minnesota withdrew the amendment after a committee added a clause to exclude abortion from the scope of the amendment.

I believe it is unprofessional for us as legislators, whether or not we particularly care about abortion, to leave such an important and sensitive question unanswered after it has been raised. It would be especially tragic if legislators who do wish to minimize the killing of pre-born children were to give pro-abortion lawyers and pro-abortion judges a new and powerful tool with which to enhance and extend the abortion right, especially by mandating the use of tax funds to pay for abortions.

An effort will be made to insert clarifying language in the ERA so that it cannot be used to expand abortion rights. There is simply no good reason for the rejection of such a clause, unless the ERA is intended as an abortion rights and abortion funding amendment.

By voting for clarifying language to exclude abortion and abortion funding from the scope of the ERA, members of Congress who are genuinely committed to the ERA and who are also genuinely committed against the expenditure of tax funds for abortion will have an opportunity, perhaps their only opportunity, to honor both commitments.

Thank you.

Senator HATCH. Thank you, Congressman Hyde. Could you please elaborate upon the relationship between the proposed Equal Rights Amendment and abortion? Do we not already have a situation in this country of abortion on demand; if that is so, how could the ERA worsen the situation from your perspective?

Mr. HYDE. Well, many of us hope that the Supreme Court would reconsider its *Roe* v. *Wade* decision because it is based on highly speculative foundations of a right to privacy which nobody found for 200 years in the Constitution.

I suspect that given another opportunity to review its rationale in that case under the present Constitution, they might find differently. I do not know; at least that is the hope.

If the ERA becomes the law of the land in our Constitution—part of the basic law of the land—it just seems to me that under the arguments made by the ACLU in these three cases, you hand an additional constitutional weapon to them in validating and legitimizing a constitutional basis for killing unborn children.

Senator HATCH. In *Roe* v. *Wade* and, I might add, subsequent court decisions, the Court theoretically has kept the door open for some restraint on abortion during the last 3 months or what they call the third trimester, although some suggest that this possibility exists more in theory, than in practice.

Would you say that the ERA might render the right to abortion absolute even during the third trimester of pregnancy?

Mr. HYDE. Oh, yes. The suspect classification would not make any distinctions in trimesters. *Roe* v. *Wade* is a set of hospital guidelines more than a decision, although it is a decision as well.

The Equal Rights Amendment is omnibus in its finding that any legislation that would be based on sex discrimination, and pregnancy only happens to women, would be probably stricken. I did not used to think that, but looking at what the ACLU has done in these three cases, I now do believe that and I think it ought to be clarified.

I would like an amendment in the Constitution outlawing abortion, protecting all human life.

Senator HATCH. Right.

Mr. HYDE. But at least let us say in the ERA that this does not broaden any abortion rights or create any.

Senator HATCH. You think the language of the proposed ERA needs to be amended in order to ensure that it would not constitutionally broaden the right to abortion?

Mr. HYDE. I believe that because the arguments have already been made in court based on State ERA's that they do grant that right. Now, one of the main problems with the ERA, if not the main problem, is that nobody really knows what the courts will do with its language in this case, this case, or this case.

I listened to a very bright, talented lawyer testify that she was not sure how this would work out and that would work out. Well, it is perhaps unfair because even courts get to think about these things for a while and you get confronted with a complex question and are supposed to give an answer.

But the point is nobody knows what courts will do under the broad umbrella of the ERA, and this lack of certitude requires us in passing an ERA, if indeed we do, to try and eliminate a major sensitive public policy question that we want decided not by the whim of the courts but by congressional affirmation.

Senator HATCH. I take it, then, that it is your viewpoint that the Equal Rights Amendment would invalidate the Hyde amendment on Medicaid funding for abortion, as well as similar amendments that now exist at the State and local levels?

Mr. HYDE. I do not want to say it will do that, but I will tell you that there is an awfully good chance that it would do that. It is very much in doubt. I do not want to be confronted with an ERA and a court saying, "Well, even Congressman Hyde said it would be invalid under this." I hope that is not so, but I am in doubt, as I think every person has to be in doubt, having read some of the cases that I have talked about.

Senator HATCH. What is the general perspective of the prolife community on the Equal Rights Amendment?

Mr. HYDE. In my travels and in my years of dealing with this issue, I have found many women and men who are supportive of the ERA and supportive of the prolife position. I think they have not seen a connection between the two, but I think that is all before the ACLU decided to utilize the State ERA's in litigation.

I think some very prominent people, such as Claire Booth Luce, for example, and others, are going to have to rethink their support for an ERA that is unadorned by an appropriate amendment eliminating abortion from its purview.

So, I think we all have to rethink that, seeing what has happened in the courts. I have, certainly.

Senator HATCH. Could you describe the so-called conscience clauses that many hospitals have adopted with respect to abortion, and comment on whether the ERA would have an effect on those conscience clauses?

Mr. HYDE. Well, conscience clauses are a recognition of human nature by the legislature that many nurses and surgical attendants, doctors, and interns are repelled by abortion. They feel that they are there to heal and to cure, not to exterminate, so they refuse to participate in these by now legal, under court fiat, surgical procedures. Recognizing the right of conscience, laws have been passed to protect these people from losing their jobs.

If, of course, the ERA is to reconfirm *Roe* v. *Wade* rather than give us a chance to reverse *Roe* v. *Wade*, I would suspect that those conscience statutes would be challenged and attacked. I do not know how successful those attacks would be because you cannot really force somebody, and you ought not to force somebody, to do something against their conscience.

Senator HATCH. But they may very well be forced——

Mr. HYDE. They will surely be challenged.

Senator HATCH [continuing]. If sex is treated as an absolute classification or even a suspect classification, is that right?

Mr. HYDE. Yes, they will surely be challenged and I would neither be optimistic nor pessimistic on it. But I would rather they do not have any basis for challenge.

Senator HATCH. I might point out that Professor Charles Rice of the Notre Dame University Law School said the ERA would jeopardize, at least with respect to public institutions and personnel, conscience clauses which give hospitals and medical personnel the right to refuse on grounds of conscience to perform abortions. He feels very strongly about that.

Mr. HYDE. Well, Professor Rice is a brilliant man.

Senator HATCH. Yes.

Mr. HYDE. And I certainly would never gainsay anything he has said because he is a student of this and a scholar. I think there are other ways that they do that, of course. You do not get into the best medical schools if you exhibit a resistance to performing abortion.

Senator HATCH. And there is more and more of that occurring throughout this country.

Mr. HYDE. Sure, that is right.

Senator HATCH. Well, Congressman Hyde, I want to personally thank you for being willing to testify here today. Your testimony has been very helpful to this committee.

I will just say that I think that this has been a most interesting hearing, although it has lasted for quite a long time. I feel worn out, but I can say that it has been instructive. I think we have heard some very intelligent people testify today, not the least of which is yourself, and I am just grateful for the experience.

Let me say this: we intend to hold a number of hearings on the Equal Rights Amendment, and we intend to bring in, I think, the best people on both sides of this issue. I am interested in the ERA intellectually, from a constitutional standpoint.

When we start to amend the Constitution of the United States, we ought to be very careful. There have been over 10,000 proposed amendments and only 33 have come through this system devised by the Founding Fathers. Only 26 have made it into the Constitution. There is a heavy burden of proof upon proponents.

I just hope that the House will be equally concerned and will be balanced in their hearings; that they will bring the best people in from both sides, that they will not stack their hearings, and that they will allow expressions from experts on both sides of this issue to testify. I think it is the only approach to take.

If the ERA has deserves to be in the Constitution, it ought to stand on its own merits and not on the basis of some cheerleading slogans. If it does not, it ought to be defeated.

Mr. HYDE. Well, Senator, one of the main problems I see with the ERA is that it is a leap in the dark in terms of what it means. And you have the least responsive, the least accountable, if you will, in terms of the consent of the governed and in terms of democracy, branch of Government—the Federal courts, nonelected, appointed for life—interpreting all of the nuances of domestic relations, labor law, and issues like that that really ought to be left to the elected legislators.

You can get rid of them every 2 years and every 6 years, but the Federal court is forever. And the transference to the unelected court of what is essentially enormous legislative functions is a major flaw; it is antidemocratic.

Second, I like to think the word "person"—I kind of like that word, "person," and the word "person" in the 14th amendment and in the fifth amendment ought to include women, men, Catholics, elderly, handicapped, Jews, everybody.

We guarantee every person equal protection of the law and due process of the law, and if we say that word does not include women, maybe it does not include fat people or handicapped people.

Senator **Hatch**. Well, a lot of us feel that it ought to include the unborn, as well as all others.

Mr. **Hyde**. Well, I think if it does not, the courts ought to be about their business making sure that it does.

Senator **Hatch**. We as legislators ought to, as well.

Mr. **Hyde**. Well, sure. But to take for symbolic reasons—and I can understand the symbolism of it—sex discrimination—there are places in my neighborhoods, and I speak in a larger sense, where race is a much tougher area of discrimination than gender.

So, maybe we ought to elevate to the dignity of a constitutional amendment every classification, not just sex. But I do not think it is needed. I think if we spend the time and the money and the effort enforcing the laws we have now, and educating people to the evils of discrimination, we will all be a lot farther ahead.

Senator **Hatch**. Well, thank you, Congressman Hyde. With that eloquent statement, we will recess these hearings until further notice. We will hold further hearings. Thank you so much.

[Whereupon, at 1:22 p.m., the subcommittee was adjourned.]

[The following was submitted for the record:]

MISCELLANEOUS MATERIAL

H. J. Res. 208

Ninety-second Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday, the eighteenth day of January,
one thousand nine hundred and seventy-two

Joint Resolution

Proposing an amendment to the Constitution of the United States relative to equal rights for men and women.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

"SEC. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

"SEC. 3. This amendment shall take effect two years after the date of ratification."

CARL ALBERT
Speaker of the House of Representatives.

ALLEN J. ELLENDER
President of the Senate pro Tempore.

I certify that this Joint Resolution originated in the House of Representatives.

W. PAT JENNINGS
Clerk.

BY W. RAYMOND COLLEY

[Received by the Office of the Federal Register, National Archives and Records Service, General Services Administration, March 23, 1972]

LEGISLATIVE HISTORY:

HOUSE REPORT No. 92-359 (Comm. on the Judiciary).
SENATE REPORT No. 92-689, also accompanying S. J. Res. 8 and
S. J. Res. 9 (Comm. on the Judiciary).
CONGRESSIONAL RECORD:
Vol. 117 (1971): Aug. 6, S. J. Res. 150 considered in Senate.
Oct. 6, 12, H. J. Res. 208 considered and passed House.
Vol. 118 (1972): Mar. 15, 17, 20-22, considered and passed Senate.

RATIFICATION HISTORY OF THE EQUAL RIGHTS AMENDMENT

(Congressional Research Service)

Alabama: Senate—rejected, 06/12/73, 26-6; rejected, 01/31/78, 24-8.

Alaska: House—ratified, 03/24/72, 38-2. Senate—ratified, 04/05/72, 16-2.

Arizona: House—rejected in committee, 02/22/73; rejected in committee 03/07/74, 7-5; rejected in House 02/25/75, 41-19. Senate—rejected in committee, 03/05/73; rejected in committee 04/01/74, 5-4; rejected in Senate 02/13/75, 16-14; approved on 1st reading 02/26/76, 16-14; rejected on 2nd reading 03/01/76, 15-15; rejected in Senate, 05/05/77, 18-11; rejected by passing amended version striking section 2, 04/11/78, 17-13.

Arkansas: Senate—rejected by passing amended version 02/01/73, 20-14. House—approved a "do pass" recommendation in committee, 02/16/77, voice vote; approved a "do not pass" recommendation in committee, 03/14/79, by a vote of 14-4.

California: Senate—ratified, 11/09/72, 29-9. House—ratified, 11/13/72, 54-16.

Colorado: House—ratified, 04/13/72, 61-0. Senate—ratified, 04/21/72, 30-1.

Connecticut: House—rejected, 04/06/72, 83-77; ratified, 03/08/73, 99-47. Senate—ratified, 03/15/73, 27-9.

Delaware: Senate—ratified, 03/22/72, 16-0. House—ratified, 03/23/72, 37-0.

Florida: House—ratified, 03/24/72, 91-4; rejected, 04/17/73, 64-54; ratified, 04/10/75, 62-58; ratified, 05/17/79, 66-53; ratified, 06/21/82, 60-58. Senate—rejected in committee, 04/04/73, 3-3; rejected in Senate, 04/10/74, 21-19; rejected, 04/25/75, 21-17; rejected, 04/13/77, 21-19; rejected in committee, 04/04/79, 12-4; rejected, 05/24/79, 19-21; rejected, 06/21/82, 22-16.

Georgia: House—rejected in committee, 02/19/73, 9-2; rejected in House, 01/28/74, 104/70; rejected in House, 01/25/82, 116-57. Senate—rejected, 02/17/75, 33-22; rejected in committee, 01/12/78, unanimously; rejected, 01/21/80, 33-23; rejected in House, 01/27/82, 116-57.

Hawaii: House—ratified, 03/22/72, 5[illegible]-0. Senate—ratified, 03/22/72, 25-0.

Idaho: House—ratified, 03/24/72, 59-5; rescission defeated 02/13/74, 35-35; rescinded, 02/04/77, 44-22. Senate—ratified, 03/24/72, 31-4; rescinded, 1974, 2 dissenting votes; rescinded, 02/08/77, 18-17.

Illinois: Senate—ratified 05/[illegible]/72, 30-21; rejected in committee, 04/04/73, 14-7; rejected, 06/18/74, 30-24 as three-fifths majority is necessary for ratification in Illinois; Senate voted to retain the rule requiring a three-fifths vote to ratify a constitutional amendment, 03/05/75; Senate voted not to discharge measure from committee, 06/17/75, 30-28; rejected, 12/16/76, 29-22, as three-fifths majority is necessary for ratification in Illinois. House—rejected 05/16/72, 75-68, rejected, 06/30/72, 82-76; rejected, 04/04/73, 95-72; ratified, 05/01/75, 113-62; rejected a motion to change the three-fifths majority necessary to ratify a constitutional amendment to a simple majority, 03/09/[illegible], 100-66; rejected, 06/02/77, 101-74, as 107 votes were needed to ratify; rejected 06/07/78, 101-65, as 107 votes were needed for ratification; rejected 06/22/78, 105-71, as 107 votes were needed for ratification; rejected, 06/18/80, 102-71; rejected 06/22/82, 103-72, as 107 votes were needed for ratification.

Indiana: House—ratified, 02/14/73, 53-45; ratified, 01/24/75, 61-39; ratified, 01/12/77, [illegible]4-45. Senate—rejected, 04/02/73, 34-16; rejected in committee, 02/13/75, 8-5; ratified, 01/18/77, 26-24.

Iowa: House—ratified, 03/24/72, 73-14. Senate—ratified, 03/24/72, 4[illegible].

Kansas: House—ratified, 03/28/72, 86-37; rejected rescission, 02/24/77, 66-56. Senate—ratified, 03/28/72, 34-5.

Kentucky: House—ratified, 06-12-72, 56-31; voted to rescind, 02/18/76, 57-40; voted to rescind, 03/16/78, 61-28. Senate—ratified, 06/15/72, 20-18; voted to rescind, 03/14/78, 23-15. 03/20/78—the Lieutenant Governor, acting with the power of the Governor who was out of town, vetoed the rescission of Kentucky's ratification of ERA.

Louisiana: Senate—ratified, 06/07/72, 25-13; approved an amended version of ERA, 01/22/75, 21-16. House—rejected, 06/29/72, 64-32; rejected in committee, 06/19/74, 10-7; rejected in committee, 06/11/75, 8-7; rejected in committee, 06/16/76, 10-6; rejected in committee, 06/07/77, 11-5; rejected in committee, 06/11/79, 11-5.

Maine: House—ratified, 02/27/73, 74-72; ratified, 01/17/74, 78-68. Senate—rejected, 03/08/73, 16-15; ratified, 01/18/74, 19-11.

Maryland: House—ratified, 03/24/72, 86-32. Senate—ratified, 03/31/72, unanimous.

Massachusetts: Senate—ratified, 06/19/72, voice vote. House—ratified, 06/21/72, 205-7.

Michigan: House—ratified, 05/18/72, 90-18. Senate—ratified, 05/22/72, voice vote.

Minnesota: House—ratified, 01/17/73, 104-28. Senate—ratified, 02/08/73, 48-18.

Mississippi: Senate—rejected in Senate Committee, 02/08/73, 7-2; rejected in committee, 03/09/76, 4-3; rejected in committee 01/28/77, 5-4.

Missouri: Senate—rejected in committee, 02/06/73, 7-3; rejected in Senate, 06/02/75, 20-14; rejected, 03/15/77, 22-12. House—rejected, 05/09/73, 81-70; ratified, 02/07/75, 82-75.

Montana: House—ratified, 01/18/73, 73-23. Senate—rejected, 02/02/73, 25-2; ratified, 01/11/74, 35-14; rejected rescission, 02/09/77, 25-25.

Nebraska: Unicameral legislature—ratified, 03/23/72, 38-0; rescinded, 03/15/73, 31-17, rejected ratification, 02/04/75, 25-25.

Nevada: Senate—rejected, 03/01/73, 16-4; rejected, 02/19/75, 12-8; ratified, 02-08-77, 11-10; defeated, 01/16/79, 14-3. House—ratified, 02/17/75, 27-13; rejected, 02/11/77, 24-15.

New Hampshire: House—ratified, 03/23/72, 179-81. Senate—ratified, 03/23/72, 21-0.

New Jersey: House—ratified, 04/17/72, 62-4. Senate—ratified, 04/17/72, 34-0.

New Mexico: House—ratified, 02/13/73, 40-22. Senate—ratified, 02/13/73, 33-8.

New York: Senate—ratified, 04/20/72, 51-4. House—ratified, 05/03/72, 117-25.

North Carolina: Senate—rejected, 03/01/73, 27-24; rejected, 03/01/77, 26-24; rejected in committee 02/16/79; motion to table 06/04/82, 27-23. House—rejected in committee, 01/21/74, 10-6; approved on first reading, 04/15/75, 60-58; rejected on second reading, 04/15/75, 62-57; ratified, 02/09/77, 61-55.

North Dakota: Senate—ratified, 02/07/73, 30-20; ratified, 01/24/75, 28-22; rejected rescission, 02/17/77, 32-18. House—rejected, 02/23/73, 51-49; ratified, 02/03/75, 52-49.

Ohio: House—ratified, 03/28/73, 54-40. Senate—rejected in committee, 04/22/73, 6-3; rejected in committee, 05/08/73, 5-4; ratified, 02/07/74, 20-12.

Oklahoma: Senate—ratified, 03/23/72, voice vote. House—rejected, 03/29/72, 52-36; rejected, 02/01/73, 53-45; rejected a "do pass" motion, 01/21/75, 51-45; rejected a "report progress" motion, 01/21/75, 51-45; approved a "do not pass" motion, 01/21/75, 50-43; referred back to second House Committee, 03/15/77.

Oregon: Senate—ratified, 02/01/73, 23-6; reaffirmed their ratification, 02/22/77, 48-14. House—ratified, 02/08/73, 50-9.

Pennsylvania: House—ratified, 05/02/72, 178-3. Senate—ratified, 09/20/72, 43-3.

Rhode Island: Senate—ratified, 04/04/72, 39-11. House—ratified, 04/14/72, 70-12.

South Carolina: House—ratified, 03/22/72, 83-0; rejected, 04/26/73, 62-44; rejected on a motion to table, 03/6/75, 46-43. Senate—rejected on motion to table, 02/07/78, 23-18.

South Dakota: Senate—ratified, 01/29/73, 22-13; rejected rescission, 03/08/77. House—ratified, 02/02/73, 43-27. 03/01/79, Senate concurred with House in holding prior ratification of ERA null and void, effective 03/23/79.

Tennessee: House—ratified, 03/23/72, 70-0; rescinded, 04/23/74, 56-33. Senate—ratified, 04/04/72, 25-5; rescinded, 03/19/74, 17-11.

Texas: Senate—ratified, 03/29/72, unanimously. House—ratified, 03/30/72, 137-9.

Utah: House—rejected, 01/24/73, 51-20; rejected, 02/18/75, 54-21.

Vermont: House—rejected, 1972, 69-67; ratified, 01/12/73, 120-28. Senate—ratified, 02/21/73, 19-8.

Virginia: House—rejected in committee, 02/06/73, 13-2; rejected in committee, 02/27/74, 12-8; House failed in effort to change rules, 01/21/77, 62-46; rejected in committee, 02/09/78, 12-8. Senate—rejected in committee, 02/28/74, 10-5; approved in committee, 01/17/75, 6-5; rejected in Senate, 01/21/75, 21-19; rejected in committee, 01/23/75, 8-7; rejected in committee, 01/04/76, 8-7; rejected in Senate, 01/27/77, 20-18 as 21 votes were necessary for ratification; Senate Privileges and Elections Committee voted 8-7 against a proposal to ratify; Senate rejected, 02/12/80, 19-20 (21 votes necessary to ratify); Senate rejected, 02/17/82, 19-20.

Washington: House—ratified, 03/09/73, 76-21. Senate—ratified, 03/22/73, 29-19.

West Virginia: Senate—ratified, 04/21/72, 31-0; rescission defeated, 02/26/74, 18-15. House—ratified, 04/22/72, unrecorded vote.

Wisconsin: House—ratified, 04/19/72, 81-11. Senate—ratified, 04/20/72, 29-4.

Wyoming: House—ratified, 01/15/73, 41-20. Senate—ratified, 01/24/73, 17-12; defeated rescission, 01/22/77, 16-14.

STANDARDS OF REVIEW: SCHEME OF ANALYSIS USED UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

(Congressional Research Service, 1983)

STRICT SCRUTINY

Most active form of judicial review.

Applied in situations where there is a suspect classification or fundamental interest, e.g., race.

Classification must serve a "compelling" state interest in order to survive constitutional challenge.

Easier burden on parties challenging the classification to prove it is unconstitutional, but more difficult for the government to justify the classification; most statutory classifications subject to strict scrutiny are invalidated.

Government has to show that there is a "compelling" state interest necessitating that action and that the distinctions or classifications are necessary to reach the purpose sought to be furthered.

INTERMEDIATE REVIEW

Applies in a sex-based classification context.

Less deferential than rational basis review; but less strict and less fatal than suspect classification/fundamental interest standard.

In gender context, sex-based classification must, in order to withstand constitutional challenge, serve important governmental objectives and must be substantially related to the achievement of those objectives.

This intermediate form of review is the last of the three to be developed by the Supreme Court; it has been applied in other contexts such as illegitimacy and alienage; there appear to be a range of intermediate review standards.

RATIONAL BASIS, TRADITIONAL REVIEW

Least active form of judicial review.

As long as the classification is rationally related to some legitimate or permissible governmental interest, then the classification will survive an equal protection challenge.

Difficult for parties challenging the classification to prove its unconstitutionality; easier for government to justify the classification.

Most classifications reviewed under this standard survive constitutional challenge.

This rational basis standard is the first form of review of the three articulated by the Supreme Court.

THE IMPACT OF THE EQUAL RIGHTS AMENDMENT: PRIVATE EDUCATION

TUESDAY, SEPTEMBER 13, 1983

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The subcommittee met, pursuant to notice, at 9:33 a.m., in room SD-562, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Thurmond, Metzenbaum, and DeConcini.

Staff present: Stephen Markman, chief counsel; Randall Rader, counsel; Sharon Peck, chief clerk; Leslie Leap, clerk, and Bob Feidler, minority chief counsel.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. Ladies and gentlemen, this marks the second day of hearings by the Subcommittee on the Constitution on the proposed Equal Rights Constitutional Amendment. On May 26, the subcommittee conducted the first hearing on this measure in more than a decade, taking testimony from the chief Senate sponsor of the ERA, the distinguished junior Senator from Massachusetts, as well as from constitutional scholars on both sides.

What the subcommittee initiates this morning is a series of hearings focusing on the potential impact of the ERA upon specific areas of law and public policy. As I indicated at the outset of our last hearing, a principal objective of the committee has been to reorient the focus of debate on the proposed amendment. I believe that I am not alone in suggesting that the debate of the past decade, inside and outside Congress, inside and outside the State legislatures, has often been unsatisfying and unenlightening one. On the one side of the issue, we have been inundated with generalities and sloganeering about second-class citizenship for women and placing women in the Constitution. On the other side of the issue, we have been subject to equally uninstructive rhetoric relating to unisex restrooms, lesbian rights, and so forth. While there have been thoughtful individuals joining this debate on both sides of the issue, I do not believe that such individuals have always been able to make themselves heard amidst the political shorthand that has dominated the debate thus far.

It is imperative that we know what the impact of the ERA will be prior to its ratification by the States. We must have a far clearer picture than we presently have of how our laws and public policies would be altered by the equal rights amendment; how life would be different following passage of the ERA. What legislative revisions would be sought? What litigation would be pursued? What broad national policies would be called into question? If we are going to make the alterations of society demanded by the ERA, these alterations ought to be the subject of adequate forewarning, not achieved surreptitiously. As Harvard law Prof. Paul Freund has remarked about the amendment: "A change so far-reaching and influential ought not be brought about as the half-hidden implication of a constitutional motto."

The subject of today's hearing will be the potential impact of the equal rights amendment upon private and parochial education. Subsequent hearings will deal with such matters as the impact of the ERA upon military law, its impact upon the employment relationship, its impact upon family law, and so forth. When these hearings are completed, I am confident that each of us, regardless of our position on the amendment, will have a far better idea of its likely effects. Whatever happens to the ERA in Congress and in the State legislatures, I am confident that these hearings will contribute to a better-informed decisionmaking process.

In addition to focusing upon specific areas of the law which may be affected by the ERA, these hearings will also be characterized by a smaller than usual number of witnesses so that the members of this subcommittee can engage in thorough exchanges on each of the covered topics. We will be inviting testimony from many of the Nation's leading experts on these topics and will attempt to ensure that each hearing is as philosophically balanced as possible.

When these hearings are completed, I hope that this panel will have built up a legislative record—a legislative history—on the equal rights amendment that will be unparalleled.

I cannot resist calling attention to the apparent difference in philosophy this subcommittee has with our counterpart subcommittee in the House of Representatives. Whereas our subcommittee is making a good-faith effort to see that all points of view are reflected at these hearings in a balanced manner, I would regrettably contrast this with the House hearings where those with reservations about the ERA have to fight to bring in even a small fraction of the witnesses brought in by the leadership of that panel. Whereas our subcommittee is attempting, as best as we are able, to allow both sides to bring in an equal number of witnesses, the leadership of the House subcommittee has been adamant in its refusal to allow more than 2 minority witnesses per 14 witnesses invited by the majority. Unfortunately, this notion of fairness appears to be standard procedure. This concerns me a great deal because I think the ERA deserves careful consideration by both sides and not just by one.

Before we begin with the first witness I wish to place in the record prepared statements of Chairman Strom Thurmond and Senator Quentin Burdick.

[Statements follow:]

PREPARED STATEMENT BY SENATOR STROM THURMOND

Mr. Chairman: I want to commend you for holding this the second day of hearings on Senate Joint Resolution 10, the proposed Equal Rights Amendment. From past experience. I know that under your able leadership that this hearing will provide for the fairest possible presentation of the views from both sides of this important issue.

As you know, I cosponsored the original ERA back in 1972. During the national debate that ensued, many important questions were raised concerning the possible impact of this amendment on American society. Because of these questions—many of which remain unanswered—I have decided to examine this proposal anew.

From the last hearing conducted on this resolution, I found the testimony presented to be interesting but not very helpful in providing the answers to some of the questions surrounding this amendment. It is very evident that the proponents are not sure what the legal effect of this proposal will be. Rather than provide the answers so sorely needed by those Senators who are undecided on this issue, those speaking in favor of the passage of the ERA simply said that much of what is unknown about the effect of the amendment will be decided in the courts.

Simply stated, I am not pleased by such a vague and open-ended response. With the activist stance that much of the Federal judiciary has taken in recent years, the response that "the courts will ultimately decide" raises the unfavorable prospect of having Federal judges remodel American society on the basis of an absolute standard of judicial review—one that could allow for no governmental distinctions between men and women.

I believe that a proposal such as this one could bring about unexpected and, perhaps, unwanted changes in our society as we presently know it. Therefore, it is imperative that we as lawmakers obtain the best and most complete information possible about this proposal. This is the only way that we can make an informed decision before casting our votes.

Mr. Chairman, I sincerely hope that today's hearing will provide us with some of the information on the effect of ratification that we so badly need. Again, I thank you for the fine work that you have done in putting this hearing together. I look forward to hearing the testimony to be given today.

PREPARED STATEMENT BY SENATOR QUENTIN N. BURDICK

Mr. Chairman, I am pleased that you are holding additional hearings on the proposed Equal Rights Amendment to the Constitution.

I am a hearty supporter of this proposal. Although all of the amendments to the Constitution are subject to interpretation by the courts, they do look closely at the legislative intent of the various amendments—if it exists—for guidance. Therefore, these hearings should establish the legislative intent for the ERA. Considering the controversy around this particular proposed amendment, the more extensive the legislative intent, the less difficulty the courts may have interpreting it, and the less litigation it will spawn.

Three specific applications that have been given to the ERA are causing concern among my constituents in North Dakota. I believe that you, Mr. Chairman, are also concerned about these applications. They include the effect of the ERA on abortion funding, women in the military, and rights for homosexuals. I will discuss these three areas and entertain for the subcommittee what I believe should be the effect of the ERA in these areas.

First of all, it is clear from constitutional law under the equal protection clause, that before a charge of discrimination can be levied, one must pinpoint a classification that demarcates two or more different classes and then treats those classes differently based on the classification.

Applying this well-founded analysis to the ERA would indicate that the ERA could not be invoked unless some governmental action is found which distinguishes between females and males, and then treats the two groups differently. It is of utmost importance that the classification be based on sex and not on some other factor.

Abortion funding is not based on sex. It is based on pregnancy. Therefore, the ERA would not affect abortion funding one way or the other. Funding for abortions, when provided, is not given to all women, it is given to certain pregnant women. The Supreme Court in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), held that exclusion of disability based on pregnancy from an insurance system does not discriminate based on sex. The two groups are pregnant persons and nonpregnant persons, not women and men.

Similarly, the ERA would not affect the rights of homosexuals as such. Again, homosexuality is not a sex classification. Rather, homosexuality is a distinction based on sexual preference. The ERA would merely say that what rights male homosexuals have must be afforded to female homosexuals as well, and vice versa. It would neither grant additional, nor take away existent rights for homosexuals.

Finally, the question of combat duty for women is raised. This, I believe, is a legitimate concern that would be affected by the ERA. An analogy to government employment is appropriate. The ERA would not say that an equal number of men and women have to be employed in a given agency or job position. However, it would say that both men and women must be equally considered for the jobs, and based strictly on their qualifications, they get the jobs, promotions and salary benefits. All the decisions are based on factors other than sex.

Likewise, in the military, the draft, if one is instated, as well as specific positions—combat or otherwise—can be based on factors legitimate to the common defense and to the special functions of the military. If women meet the conditions, then there is no reason to exclude them.

In conclusion, Mr. Chairman, I firmly believe that the guarantee of equality between the sexes should be raised to a heightened constitutional level by adopting the Equal Rights Amendment. Any attempts to amend the currently proposed language to provide for specific concerns should be resisted. Our judicial system, based on legislative intent and established constitutional adjudication, will adequately—and in fact most appropriately—handle the various concerns that have already been raised, as well as those concerns about which no one has yet speculated that are sure to be raised in the future.

Senator **Hatch**. Ladies and gentlemen, we have two outstanding witnesses before this subcommittee today who, I am confident, will shed a great deal of light upon the impact of the ERA in the area of private and parochial education. I very much look forward to their testimony here today.

Our first witness today will be Prof. Jeremy Rabkin, professor of government at Cornell University and director of the program on courts and public policy at Cornell. Professor Rabkin has contributed to many popular and academic journals and is one of the most thoughtful observers of American education policy.

Our next witness after Professor Rabkin will be Ms. Donna Shalala, the former Assistant Secretary of the Department of Housing and Urban Development during the Carter administration. Ms. Shalala is currently the president of Hunter College in New York City, one of the most important schools in that city's system. As with Professor Rabkin, she is also widely recognized on the issues of educational policy. Ms. Shalala has been selected by ERA proponents on this committee as their preferred witness on this matter.

This committee is proud to have two top experts testify before us today, one for and one with some serious reservations about the equal rights amendment.

Professor Rabkin, we will turn to you, please.

STATEMENT OF JEREMY A. RABKIN, ASSISTANT PROFESSOR, DEPARTMENT OF GOVERNMENT, AND DIRECTOR, PROGRAM ON COURTS AND PUBLIC POLICY, CORNELL UNIVERSITY

Professor **Rabkin**. Thank you.

I believe this subcommittee is performing a great service to this country in attempting a careful assessment of the legal implications of the equal rights amendment. I feel honored at being asked to contribute to this assessment of the legal implications of the equal rights amendment, and I will focus my remarks on the likely effects of the ERA on private education, a problem which I think has not yet received the attention that it deserves.

Because the language of the equal rights amendment is addressed to the State and Federal governments, many people assume that its effects will be limited to public schools and to State universities. But I think this view is certainly mistaken. I will try in a brief space here to indicate some of the ways in which the equal rights amendment is likely to impact on private education.

Title IX of the Education Amendments of 1972 already prohibits sex discrimination in any education program or activity receiving Federal financial assistance. There are, however, a number of exceptions in title IX. Most importantly, there are a series of exceptions dealing with admissions, which allow private institutions to receive Federal funding and still be single-sex institutions up to the level and including the level of private colleges. The other exception there is for any school controlled by a religious organization to the extent that its prohibition on sex discrimination would not be consistent with the religious tenets of such organization.

To begin with, it seems to me indisputable that the equal rights amendment would prohibit direct Federal, or for that matter, direct State grants to any single-sex institution. In the second place, I think it is very, very likely that the equal rights amendment would prohibit tax exemptions for single-sex institutions and indeed, tax exemptions for institutions that practice any form of sexual differentiation.

I would have predicted that even last year, and over the past several years a number of scholars have predicted that. I think you can say this with much more confidence and certainty since the decision of the Supreme Court in *Bob Jones University* v. *United States*. In that case, many of you will recall, Bob Jones University was finally judged not eligible for tax exemption because it has a ban on interracial dating. This school is integrated, that is, it does accept black students, but it had this peripheral aspect of its policy which was discriminatory, and the Supreme Court held that that was enough for the IRS to deny its tax exemption.

Now, it seems to me if you follow that precedent with regard to the ERA, it really is inescapable that not only single-sex schools, but schools which maintain some kind of incidental differentiation or, if you like, discrimination, on the basis of sex would also be disqualified from receiving tax exemptions. That means, it seems to me, not only that, for example, Catholic seminaries which exclude women would be ineligible for tax exemptions, but Orthodox Jewish schools which maintain separation in seating between men and women in religious ceremonies would on the same reasoning be ineligible for tax exemption.

Now, the significance of losing tax exemption is not only that you may, as a school, have to pay some taxes directly; more importantly, it is that contributions to the school are not tax deductible. And for many schools, that means losing an important source of income. It has been estimated that as much as 20 percent of the income of private elementary and secondary schools would be lost to them if they lost their tax-exempt status. For private colleges the figure is undoubtedly much higher. Since many private schools are in a financially precarious state, I think that means for a great many private schools, they will either conform to national standards on sex, or they will, perhaps, be driven into oblivion.

There are lots of other ways, it seems to me, in which the equal rights amendment would very much constrain private education.

In *Norwood* v. *Harrison*, the Supreme Court held that States could not provide textbooks to private schools practicing race discrimination. These were textbooks loaned directly to the students, not to the schools, and they were made available to all the students in the State. Again, if you follow that precedent, it seems to me fairly clear that schools which are single-sex or schools which maintain some pattern of sexual differentiation may forfeit participation in State or Federal programs in which some kind of incidental or indirect aid is made available to schools.

It seems to me even participation in Federal student loan programs would have to be forfeited by schools that maintain some kind of sexual distinction.

Let me, without belaboring the point or multiplying examples, say as a general matter, the effect of this would be to very much isolate and in effect penalize a small number of private schools which want to maintain a somewhat different educational pattern than has now become the norm. And I think we should think carefully about whether we really do want to penalize schools that are somewhat different in regard to the way they treat men and women or boys and girls.

If you go back to title IX, the congressional prohibition on sex discrimination in education programs receiving Federal assistance, Congress introduced all kinds of exceptions there because it did not want to have an absolutely blanket, uniform rule. And it has over the years introduced amendments to that statute to clarify various things it did not want covered.

It seems to me all of these amendments reflect what is a fairly broad public sentiment that we do not want to treat sex discrimination in quite such a rigid and unyielding way as race discrimination. If the ERA is ratified, I think it will require that sex discrimination be treated in the same way as race discrimination, and as I say, I think this really will have considerable effect on what are, after all, not a very large number of schools, but still, a fair number of private schools that have somewhat different patterns.

Thank you.

Senator HATCH. Thank you, Professor.

[The following was received for the record:]

PREPARED STATEMENT OF JEREMY A. RABKIN

I believe this subcommittee is performing a great service to the country in attempting a careful assessment of the legal implications of the Equal Rights Amendment. And I feel honored at being asked to contribute to this assessment. I will focus my remarks on the likely effects of the E.R.A. on private education, a problem that has not yet received the careful attention that I believe it deserves.

The language of the proposed Equal Rights Amendment is addressed to the state and federal governments. Many people therefore assume that its effects will be limited to public schools and state universities. This view is certainly mistaken. In fact, because most public educational institutions are already subject to statutory prohibitions on sex discrimination, private institutions may be much more seriously and directly affected by the E.R.A. than their public counterparts. Proponents of the amendment may welcome all the changes it would bring to private education. My own view is that the scale of these changes ought to give us some pause. But I will try to report my analysis of the likely consequences here as impartially as I can.

Effect on Direct Subsidies

It is already illegal for educational institutions to practice sex discrimination if they are recipients of direct federal grants. Title IX of the Education Amendments of 1972 prohibits sex discrimination in "any education program or activity receiving federal financial assistance."[1] The language was modeled on Title VI of the Civil Rights Act of 1964, which prohibits discrimination "on the basis of race, color or national origin" in any federally funded program.[2] Title VI was understood at the time of its adoption to embody a constitutional requirement that government not give direct aid to racial discrimination. Title IX was not conceived as implementing a constitutional obligation in regard to sex discrimination, however. Thus, while the prohibition against funding of race discrimination is cast in absolute terms in Title VI, the prohibition in Title IX is subject to numerous exceptions. By constitutionalizing an absolute prohibition of government involvement in discrimination, the Equal Rights Amendment would effectively eliminate these exceptions in Title IX.

At present, Title IX does not apply to admissions decisions in any elementary or secondary school (except for "institutions of vocational education") nor in any private college. In other words, it permits private schools, up to the level of undergraduate college training, to operate as single-sex institutions and still remain eligible for federal funding. It also exempts any school controlled by a "religious organization" to the extent that its prohibition on sex discrimination "would not be consistent with the religious tenets of such organization." By contrast, the E.R.A. would almost certainly prohibit direct federal -- or for that matter, state - grants to any single-sex institution. Nor has any commentator argued that it would provide any exemption for religious schools.

As it is, the Supreme Court has held that the First Amendment prohibits direct government grants to any religious school at the elementary or secondary level.[3] And direct grants to nonsectarian private schools at this level are not very common or very extensive. But the Supreme Court has allowed religious institutions of higher education to receive substantial government assistance[4] and many of these schools may not be able to comply with a requirement of absolute non-discrimination or non-differentiation. These colleges, along with secular women's colleges and any schools that try to maintain a fixed sexual ratio in their student body, may thus face some painful financial sacrifices to retain their established character. But this is only the beginning of the difficulties that the E.R.A. is likely to pose for unconventional private schools.

Effect on Tax Exemptions

Apart from its effects on direct subsidies, the Equal Rights Amendment may have its greatest impact on private schools through its implications for tax policy.

Since 1970 the Internal Revenue Service has been denying tax exempt status to private schools that practice racial discrimination. This policy was initiated in response to a successful 1969 suit by civil rights groups in Green v. Kennedy and subsequently affirmed by the same three-judge district court in Green v. Connally in 1971.[5] As this subcommittee is doubtless aware, the Supreme Court emphatically endorsed the I.R.S. policy this spring in Bob Jones University v. Regan.[6]

Several aspects of the Court's decision in Bob Jones deserve special notice. First, the Court held that recognition as a "charitable" organization -- one eligible for tax exempt status -- must be withheld from institutions involved in any activity that is "contrary to a fundamental public policy." The tax code need not directly prohibit this activity: it does not expressly prohibit racial discrimination. And this activity need not actually be illegal in itself: no law prohibits Bob Jones University from maintaining the ban on interracial dating that got it into trouble with the IRS. The Supreme Court held that the IRS was nonetheless justified in revoking the tax exempt status of Bob Jones University because, if it had been a state institution, constitutional rulings would plainly have prohibited the school from maintaining a ban on interracial dating. This was enought to prove, as the court saw it, that Bob Jones University was acting "contrary to fundamental public policy."

Now I think it is indisputable that if the E.R.A. is added to the Constitution, it will make opposition to sex discrimination a matter of "fundamental public policy." Following the Court's ruling in Bob Jones, then, it seems inescapable that all single-sex institutions must be denied tax exemptions. Thus the E.R.A. would not only make all-women colleges ineligible for tax exemptions, but also Catholic seminaries, for example - unless they admit women for training to the priesthood.

Indeed, admitting applicants of both sexes would not be sufficient, according to the Bob Jones ruling, unless the institution is oblivious to gender in all its activities. It did not save Bob Jones University, after all, that its ban on interracial dating was rather incidental to its basic educational program -- which was, it appears, fully integrated after 1976. Thus it seems inescapable that an institution like Yeshivah University in New York, which does have coeducational programs, must still forfeit its tax exemption if it maintains separate seating for men and women in religious services. That this practice is required by Orthodox Jewish tradition would be of no relevance to the operation of the tax law. In the Bob Jones case, the Court emphatically rejected the claim that Bob Jones University had any First Amendment right to exemption from the IRS policy even though its ban on interracial dating derived from the school's understanding of Biblical precepts. The Court insisted that the government's "fundamental, overriding interest in eradicating racial discrimination in education...substantially outweighs whatever burden denial of tax benefits places on petitioners exercise of their religious beliefs."[7]

It is tempting to regard these conclusions as simply too absurd or too extreme for the Supreme Court to embrace. The Court would surely try to avoid the onus of ordering Catholic seminaries to admit women candidates for the priesthood or forfeit their tax exemptions. And I would be the first to admit that the Court has often sacrificed logical or doctrinal consistency in the past to avoid unpopular or unpalatable results. Perhaps it would do so here, but one cannot be at all confident of that. To avoid this result, the Court would have to denigrate the E.R.A. itself by maintaining that it had not, after all, made opposition to sex discrimination such a "fundamental public policy" as opposition to race discrimination. Or it would have to repudiate the Bob Jones decision -- which was hailed on almost every side as expressing the evident, common sense of the law.

The Court did leave itself a possible escape hatch by resting its decision in Bob Jones on a statutory interpretation of the tax code rather than voicing direct constitutional standards. This may leave room for Congress to rescue the Court, by amending the tax code to clarify that -- the E.R.A. notwithstanding -- the "fundamental public policy" against sex discrimination should not extend to religious institutions or to various other private organizations. Yet a Congress which had recently reendorsed the E.R.A. might not feel at all comfortable in enacting such a disclaimer. And I think it is fair to say that many E.R.A. proponents would lobby hard to defeat such an amendment to the tax code -- not from any particular desire to deny tax benefits to Catholic seminaries or Orthodox Jewish day schools, but from a general commitment to the notion that tax benefits should not be available to institutions practicing sex discrimination. Even without ratification of the E.R.A., the U.S. Commission on Civil Rights urged as far back as 1975 that the I.R.S. had the authority and the obligation under existing laws to deny tax exemptions to sexually discriminatory schools.[8] Proponents of this view will be greatly fortified in their conviction if E.R.A. is finally added to the Constitution.

In fact, there is already a substantial body of precedent and opinion to support the view that tax exemptions are a form of "state action" and that the constitutional prohibitions against discrimination by the government must equally apply to all recipients of governmental tax benefits. In the Bob Jones case the Court noted that many of the amicus briefs it received -- including the one submitted by William

Coleman, who was appointed by the Court, itself -- argued that, whatever the Court's interpretation of existing tax law, the "denial of tax-exempt status is independently required by the equal protection component of the Fifth Amendment."[9] The Court's reliance on statutory interpretation of the tax code made it unnecessary for it to reach the constitutional issue, but it did not dispute the force of the argument. In fact, the Court's statutory interpretation -- which was otherwise rather strained and unconvincing in important respects -- seemed to reflect the Court's conviction that any other interpretation of the tax code would render it constitutionally defective.[10] The Green court, which first advanced this interpretation of the tax code, stated explicitly that any other approach would raise "grave constitutional issues."[11] In McGlotten v. Connally another three judge court subsequently provided a direct holding that the Constitution forbids tax exemptions for discriminatory institutions.[12] The McGlotten decision was never overruled and its reasoning has indeed been cited with approval by several other courts and a considerable number of scholarly commentators.[13]

Even before the recent decision in Bob Jones v. Regan, several commentators had already predicted that ratification of the Equal Rights Amendment would require the withdrawal of tax exemptions for single sex schools and for schools practicing any form of sex discrimination.[14] After Bob Jones, this seems even more likely -- even for religious institutions.

Effects on Other Forms of Public Assistance

First, it is worth noting that the Bob Jones case dealt not only with direct tax exemptions but with tax exempt status generally. Institutions which qualify for tax exemptions under §501(c)(3) of the Internal Revenue Code do not have to pay any form of income tax themselves. But they also benefit indirectly from this classification, because it allows private contributors to these institutions to take deductions on their own taxes for such contributions (under §170). The Bob Jones decision, like the IRS policy that preceded it, prohibited deductions for "charitable" contributions to discriminatory schools -- thus undermining the fundraising capacity of these schools by depriving would-be donors of a major incentive for making contributions. The E.R.A. would certainly have the same effect on single-sex (or sexually discriminatory) schools if it is held to prohibit their own tax exemptions.

But tax subsidies are not the only form of state assistance threatened by the E.R.A. In Norwood v. Harrison, the Supreme Court held that states may not provide textbooks to private schools practicing race discrimination.[15] The fact that the books were loaned directly to the students made no difference; not did it make any difference that the books were available on the same basis to all students at all schools in the state. Moreover, the constitutional ban on participation in this program was extended to religious schools, without any hesitation or qualification. The conclusion again seems inescapable that, if the E.R.A. is ratified, single sex private schools or private schools practicing any form of sexual differentiation would also have to forego the benefits of such programs. This may affect a considerable number of private elementary and secondary schools, since many states have adopted such textbook or equipment loan programs since 1968, when the Supreme Court declared these programs to be a permissible form of state aid to sectarian schools.[16]

At institutions of higher education, state and federal loan and grant programs will probably have to exclude students who attend single-sex or sexually discriminatory schools on the same reasoning. The Department of Education (and before 1979, the Department of Health, Education and Welfare) has indeed maintained that if a college enrolls students who participate in a federal student loan or grant program, the entire college and all its activities must comply with the federal law prohibiting sex discrimination in "any program or activity receiving federal financial assistance." Colleges that did not want to comply with HEW's elaborate regulations on sex discrimination were told that their students could no longer qualify for federal grants and loans.[17] The Supreme Court has not yet endorsed this approach as a proper interpretation of Title IX (the statute involved), but it would certainly have very great difficulty in disavowing the policy under the E.R.A.

If loans to students are threatened, it is hard to see how loans to single-sex institutions themselves can be exempt from challenge. Thus it seems quite possible that such institutions would be forced to withdraw from special library loan arrangements with state universities and other joint ventures with public institutions. Nor is this all.

In Gilmore v. City of Montgomery, the Supreme Court held that a racially segregated private school could not be given special hours to use the playing fields in a public park, because this would constitute unconstitutional state involvement with racial discrimination.[18] Under the E.R.A., therefore, it would seem that private schools must be excluded from using any public facility -- using a municipal auditorium for a graduation exercise or student concert, for example -- if the school itself does not observe approved standards of nondiscrimination in regard to sex. Further it would seem that private organizations cannot maintain any link with public schools or state universities if they fail to meet E.R.A. standards of non-discrimination. Thus, boy scout and girl scout troops may have to be excluded from public school facilities and fraternities and sororities banished from state college campuses (or at least from college owned facilities).

Regimentation vs. Isolation:
The Moral Burden on Private Education

A few commentators have suggested that, despite its apparent limitation to governmental activity, the Equal Rights Amendment could directly reach all schools, public and private. There are a few strands of constitutional doctrine and a few precedents that can be invoked to support this claim.[19] I think it is very unlikely, however, that the Supreme Court would give broader reach to a constitutional ban on sex discrimination than it has accorded to the existing prohibitions on race discrimination in the Fourteenth and the Fifth Amendments. And the Court has never held that racially discriminatory private schools are *per se* unconstitutional.

If the Court's approach to race discrimination is any guide, however, the Equal Rights Amendment will impose very considerable constraints on private schools. Schools that are not prepared to forego all forms of government assistance will have to be sexually integrated. This does not simply mean that single-sex schools will have to admit students of the opposite sex. This probably means that from kindergarten to post-graduate training *all* classes will have to be sexually integrated and all school-sponsored activities as well: gym classes and athletic programs, classes on "health" or on "women's issues" or on religion or on fatherhood, baking clubs and "consciousness-raising" groups and so on and so on. Indeed the implementing regulations for Title IX suggest that even sexually differentiating "dress codes" or counseling services may be considered "sex discrimination".[20] I do not offer these examples to caricature or denigrate the goal of sexual equality and I do not mean to say that there is anything wrong with running schools in this way. The question is simply whether all educational institutions should be pressured to conduct themselves according to such patterns

The E.R.A. would doubtless permit many single-sex institutions to continue, along with many schools that hold to traditional patterns of sexual separation or differentiation. But it would place great financial strain on such schools and a large number may not survive. It has been estimated, for example, that loss of tax exempt status would cost the average private school (at the elementary and secondary level_ over 20 percent of its annual income.[21] That exceeds the margin for survival for many schools and those that are able to absorb such a loss will be forced to curtail their programs and limit access (by increased tuition and/or reduced scholarship aid provisions). Private colleges may be even more hard hit and become even less accessible - those that survive. And beyond all the financial blows, unconventional private schools and colleges will suffer the stigma of public quarantine, treated as too tainted, in effect, for any contact or cooperation with public institutions. Those schools that can still attract students under these conditions will surely be driven to embittered isolation.

Now we have done all this to private schools that persist in racial discrimination precisely to express an unyielding abhorence to racist practices. The question again is whether we want to oppose all aspects of sexual separation or differentiation with equally uncompromising condemnation, imposing the same financial penalties and the same moral stigma. My own view is that there is something terribly wrong with a constitution that puts the sexual exclusion of a Catholic seminary or a traditional women's college on the same plane with the racial bigotry of a white supremacist "segregation academy".

I will not here attempt to argue the moral differences between race discrimination and sexual exclusion, however. I will simply record my strong impression that Americans now seem to share this sense that sexual differentiation should not be regarded with the same intolerance as race discrimination. Thus Title IX, enacted within a year of the original congressional submission of the Equal Rights Amendment, expressed strong opposition to public funding of sex discrimination in education, but the general policy was understood to require exceptions and qualifications. In addition to the original statutory exemptions for religious schools and for most kinds of single sex schools, Congress has added numerous amendments to prevent dogmatic applications of general policy by civil rights officials. Congress has acted, for example, to exempt school sponsorship of boy scout and girl scout troops, of all-female beauty pagents, of separate mother-daughter and father-son banquets and of social sororities and fraternities. Most people seem to want this flexibility even in public schools and are certainly prepared to tolerate greater diversity along these lines in private education.

The Equal Rights Amendment will almost certainly eliminate such flexibility and greatly reduce such diversity. And this will not be the effect of sloppy draftsmanship by its current sponsors or errant dogmatism by its subsequent judicial interpreters. Many sincere and thoughtful people support the Equal Rights Amendment precisely because they desire the kinds of legal consequences I have tried to sketch out in this statement. Many people do believe that opposition to sexual differentiation, like opposition to race discrimination, must override our traditional regard for religious pluralism and educational diversity. The country as a whole should consider what this means, however, before the Equal Rights Amendment is resubmitted to the states.

NOTES

1. 20 U.S.C.§ 1681-86.

2. 42 U.S.C.§ 2000d.

3. Lemon v. Kurtzman, 403 U.S.602(1971),
   Meek v. Pittinger, 421 U.S.349(1975).

4. Tilton v. Richardson, 403 U.S.672(1971),
   Hunt v. McNair, 403 U.S.734(1972).

5. Green v. Kennedy, 309 F.Supp.1127(1970),
   Green v. Connally, 330 F.Supp.1150(1971),
   aff'd sub nom. Coit v. Green, 404 U.S.997(1971).

6. Bob Jones University v. U.S., 51 L.W.4593(May 24, 1983).

7. Ibid at 4601.

8. U.S. Commission on Civil Rights, To Ensure Equal Educational Opportunity, Vol. III of The Federal Civil Rights Enforcement Effort 1974 (January 1975), p. 153-54.

9. 51L.W. at 4600, fn.24.

10. The objections to the Court's purported basis for decision are powerfully articulated not only in the dissenting opinion by Justice Rehnquist, but also in the uneasy concurrence by Justice Powell in Bob Jones. See also the strong arguments rejecting IRS authority on the basis of existing law in Bob Jones University v. Blumenthal, 468 F. Supp.890(P.S.C., 1978).

11. Green v. Kennedy, 309 F.Supp.1127(1970) at 1136,1134 and Green v. Connally, 330 F.Supp.1150(1971)at 1165:"..it would be difficult indeed to establish that such support can be provided consistent with the Constitution.

12. 338 F.Supp.488(D.D.C.1972).

13. Falkenstein v. Department of Revenue, 350 F.Supp887(D.Or. 1972); Pitts v. Department of Revenue, 333 F.Supp.662(E.D.Wisc,1971); McCoy v. Shultz, 73-1 U.S.T.C. 9233(D.D.C.1973).

14. Monica Gallagher, "Desegregation: The Effect of the Preposed Equal Rights Amendment on Single Sex Colleges," 18 St. Louis Uiversity L.J. 41(1973); Testimony of Laurence Tribe, Professor of Law, Harvard University, Tax Exempt Status of Private Schools, Hearings Before the Subcommittee on Oversight of the Committee on Ways and Means, House of Representatives, 96th Cong., 1st Session (Feb.-March, 1979), p.385.

15. 413 U.S.455(1974).

16. Board of Education v. Allen, 392 U.S.236(1968).

17. This provision in the Title IX regulation is now before the Supreme Court in Grove City College v. Bell. In Hillsdale College v. HEW, 696 F.2d418(1982), the 6th Circuit Court of Appeals invalidated this provision but indicated that it would probably not have done so if the statutory prohibition on sex discrimination were based on constitutional requirements - as would be the case under the E.R.A.

18. 417 U.S.556(1974).

19. The argument could be made that education is inherently a "public function" and that even private schools would therefore be covered by constitutional prohibitions on government. Thus Prof. Emerson noted in his widely cited article on the E.R.A. that in the field of education (along with other fields) "the public character of the function would lead to the requirement that the state assume extensive responsibility." Emerson, et.al. "The E.R.A.: A Con-

stitutional Basis for Equal Rights for Women," 80 *Yale L.J.* 81(1971) at 907. Alternately, it could be argued that the state has already involved itself so extensively in private education through regulation and accreditation standards that all or most private schools must conform to the same standards as government itself. For a sophisticated analysis of "state action" doctrine - suggesting several routes to this conclusion - see Laurence Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press, 1978), pp. 1157-1171.

20. See 40 *Fed. Reg.* 24128 et seq. (June 4, 1975) or 34 *C.F.R.* 106.3 et seq.

21. Testimony of John Esty, Jr., President, National Association of Independent Schools, *Tax Exempt Status of Private Schools*, (Hearings cited at note 14), p. 400. The precise figure offered here is 23 percent of operating budgets for boarding schools and 11 percent for day schools. But the estimate applies only to NAIS members - that is, non-church-related elementary and secondary schools. Mr. Esty, himself, suggests the figure may be much higher for church-related schools at this level and might be still higher for many colleges. Colleges with large endowments would be especially hard hit since the I.R.S. would undoubtedly tax income on these endowments: interest, dividends, capital gains from the endowments would presumably be taxed like the gains of any other investor. Finally, this figure does not calculate the substantial costs arising from the imposition of local property taxes and state sales taxes.

Senator **Hatch**. Ms. Shalala, let us turn to you and take your testimony at this time.

STATEMENT OF DONNA E. SHALALA, PRESIDENT, HUNTER COLLEGE OF THE CITY UNIVERSITY OF NEW YORK

Dr. **Shalala**. Good morning. I am Donna Shalala, president of Hunter College of the City University of New York. I am here today to speak in favor of the equal rights amendment. That amendment would finally make it unconstitutional to deny any individuals equal rights on account of sex in any area of government action. No longer would women be required to rely on the patchwork of antidiscrimination laws to enforce their rights to equal opportunity and equal treatment; nor would they bear the substantial risk that the claim for equality is unenforceable because the Government does not stand behind it, or insupportable because of some exception in the laws.

In no area of public life is the ERA more important than in education. In virtually every aspect of education, both public and private, sex discrimination continues to exist. And I am here today to discuss with you the extent of that discrimination and its impact on women and on American society.

By denying equal access to education to a woman, we clearly narrow her choices and options in employment, in income, and in mobility.

Discrimination based on sex in educational institutions creates a host of problems for female students and female employees on every level. While women now have better access to education, helped substantially by title IX, they still face the heavy burden of proving themselves in many areas. The resulting patterns are evidenced in the employment of women in education, admissions, courses of study and athletics. Without a constitutional amendment, the gains women have won are vulnerable to political whim.

Although title IX has outlawed discriminatory practices, the percentage of women enrolled in certain courses, particularly professional and graduate programs of study, still falls far short of full access to these programs.

In 1980, the proportion of women in medical school was 26 percent; in law school, 34 percent; in dental school, 17 percent, and in veterinary school, 39 percent. Women earned only 30 percent of the doctorates awarded in this country in 1980.

The problems in secondary and post-secondary education are even more severe. Almost half of all programs are still overwhelmingly segregated by sex, and 72 percent of all women in vocational education were still enrolled in predominantly female clerical programs or in home economics classes. An estimated 80 percent of women currently working are now concentrated in female-dominated occupations, which are rapidly declining or becoming obsolete as a result of technological advances.

The failure actively to recruit female students into traditionally male courses is sex-based discrimination in recruiting and training. It effectively endorses and perpetuates the pattern of discrimination that has kept women out of high-paying blue collar skilled craft jobs. There are particularly severe consequences to the widely indulged cultural bias that math and science are properly in the male domain. In 1981, only half of the college-bound girls, compared to two-thirds of college-bound boys, had completed 4 years of high school math. The gap in enrollments, especially in advanced courses, persists despite the assistance of title IX.

Women are likely to stay substantially unrepresented in scientific and technical fields, and they are still enrolling in education for these fields in significantly smaller numbers than are men. For example, in 1980, only 30 percent of all college graduates specializing in computer and information sciences were women; in 1976, while women were 40 percent of the labor force, they held only 13 percent of the jobs in math, computer, and life sciences.

Women have historically been missing from other expanding career fields, including the physical sciences and engineering.

The implications of these statistics to the Nation's future are staggering. At a time when our society is moving into an advanced technological era, we need to develop every citizen's ability to contribute. Instead, we effectively exclude half the population from these fields.

The gains for women in the important area of athletic participation are also at risk today. The current administration wants to severely limit title IX in a way that would virtually eliminate athletics from coverage by that act. For women to lose these gains would deny all young women the substantial career and health benefits that come with a full range of physical education participation.

My own experience is illustrative of the blatant discriminatory treatment of women employed in education until the very recent past. When I was a graduate student in the late sixties, my department head informed me that there was to be no financial aid for me. He argued that his statistics demonstrated that women doctoral students do not complete their degrees, and I had to find financial assistance from other sources within the university in order to earn my degree. In the early seventies, when I became an assistant professor in another college, the Chair of my department counseled me that I need not work so hard, since the department had never and would never grant a women tenure. My publications and teaching record, which he conceded were distinguished, would make no difference whatsoever. I left that institution to go to another institution that awarded me early tenure. But many other women were not so lucky.

With such active discouragement and stereotypic treatment of women in professional training, it is not surprising that the number of women teaching in higher education is low, and many fewer of them are untenured. And my complete testimony, Senator, has a lot of statistics on the number of tenured and untenured women and male faculty members by discipline.

Senator HATCH. We will put both complete written statements in the record. They are both excellent statements; I read both of them prior to coming here, and I want to compliment you both of you for it. But continue, Dr. Shalala.

Dr. SHALALA. Let me make just a couple more points.

The impact of the statistics on the loss of role models for young women, leaders for all women, and lower wages mean less job security for women. We need the equal rights amendment to supplement the protections afforded by title VII to women employed in educational institutions.

The pattern in higher education is not unique. Similar patterns are found in the employment of women in elementary and secondary education.

At the present time, the principal laws we rely on to redress sex discrimination in this country include title IX of the Education Amendments of 1972, title VII of the 1964 Civil Rights Act, equal rights amendments in State constitutions and the 14th amendment. What are rarely addressed are the major gaps in the coverage of all of these laws. Title IX's provisions apply only to admissions practices of vocational education, professional education, graduate higher education, and to public undergraduate higher educational institutions. In other words, the statute does not prohibit sex-based discrimination in admissions, whether a complete bar to women's enrollment, or a quota, or a demand for higher qualifications in the Nation's elementary and secondary schools, in private colleges, and even in public colleges, if they have always excluded persons on the basis of sex. These exceptions go to the heart of discrimination in education.

Girls and women can be denied equal access with boys and men to all educational opportunities at certain institutions, even with title IX. The statute now precludes a claim against a school district that imposes different entrance requirements on the basis of sex.

The primary weakness of title VII to redress discrimination against academically employed women is the reluctance of Federal judges to closely examine university hiring, promotion and tenure procedures. While I do not advocate a judicial takeover of academic decisionmaking, the equal rights amendment would require closer judicial scrutiny of these procedures, and it would force colleges and universities to examine their own policies and affirmatively to remove artificial barriers to women's employment and advancement.

Only 16 States have equal rights provision in their constitutions. Cases brought under State ERA's already have demonstrated to us that the Federal ERA would be an effective tool for all women seeking equal education.

The effect of the equal rights amendment on education is really quite simple. Discrimination on account of sex in education will no longer be possible. This means that unless educational policies are justified by principles of affirmative action, schools must treat males and females the same. The ERA will establish equality on a permanent basis in a way not subject to the vagaries of administration policy. This is important, since the alternative of prohibiting sex discrimination statute-by-statute, as Congresswoman Barbara Mikulski says, is a little like eliminating slavery plantation by plantation.

The ERA will do much more than any statute to ensure enforcement. Although title IX was passed in 1972, Federal enforcement has never been very rigorous.

Women now face more than neglect in government's enforcement of title IX. Officials of the current administration have launched a concerted effort to severely limit the scope and effectiveness of title IX by revising the Department of Education's regulations enforcing title IX, by the Department of Education's refusal to appeal an unfavorable court interpretation of that statute, and finally, by advocating the extremely narrow interpretation in the Department of Justice brief to the Supreme Court in the *Grove City* case.

This administration's objective is to subject to title IX only those institutions that receive Federal funds earmarked for narrowly defined specific educational programs and exclude from coverage institutions that receive Federal aid for more general purposes. For example, this administration has claimed that federally guaranteed school loan funds no longer trigger any obligation to comply with title IX. These moves represent, in my judgment, a clear strategy to turn back the clock on women's rights by reducing the number of schools covered by title IX and limiting educational opportunities and activities which women are guaranteed access to by statute.

Many academic programs, including athletics, will be devastated by the proposed interpretation of title IX. For those who share the view that women are entitled to equality, the ERA would free you and your colleagues in the House and members of the executive and legislative branches in most States throughout this Nation to debate the most cost-effective ways to implement women's right to equality, not whether they are entitled to such equality. That, I believe, is what the vast majority of you would like to do and what the vast majority of Americans would like you to do.

Thank you.

[The following was received for the record:]

PREPARED STATMENT OF DONNA E. SHALALA

Good morning. I am Donna Shalala, President of Hunter College of the City University of New York. I am here today to speak in favor of the Equal Rights Amendment. That amendment would finally make it unconstitutional to deny any individual's equal rights on account of sex in any area of government action. No longer would women be required to rely on the patchwork of anti-discrimination laws to enforce their rights to equal opportunity and equal treatment; nor would they bear the substantial risk that the claim for equality is unenforceable, because the government does not stand behind it, or insupportable because of some exception in the laws.

In no area of public life is the ERA more important than in education. In virtually every aspect of education, both public and private, sex discrimination continues to exist. Today, I am here to discuss the extent of that discrimination and its impact on women.

I need not elaborate on the importance of education in determining one's life opportunities. By denying equal access to education to a woman, we narrow her choices and options in employment, income and mobility.

The ERA is central to ensuring women's equal right to education. It will provide women with a permanent constitutional basis to assert that right. It will provide an important constitutional backdrop to the statutes designed to ensure equality and, thus, eliminate any necessity for such statutes to be liberally construed to achieve equality. It will insulate women's rights from political pressures. It will end efforts to repeal existing antidiscrimination statutes; to create special exceptions to the equality principle in antidiscrimination statutes, and to limit the remedies or means to enforce equality. Finally, it would free this Congress to implement women's equality in an efficacious and cost effective manner.

I. Sex Discrimination in Education

Discrimination based on sex in educational institutions creates a host of problems for female students and employees on every level. While women now have better access to education (helped substantially by Title IX) they still face the heavy burden of proving themselves in many areas. The resulting patterns are evident in employment of women in education, admissions, courses of study and athletics. Without a constitutional amendment, the gains women have won are vulnerable to political whim.

Admission and Course of Study for Women

In its 1981 report Title IX: The Half Full, Half Empty Glass, the National Advisory Council on Women's Educational Programs described some of the discrimination that limits women's educational opportunities. The following examples illustrate widespread sex discriminatory policies:

— Because it had few dormitories for women and would not permit them to live off campus, the University of North Carolina accepted only one-quarter of the women who applied for admission while admitting half of the male applicants.

— At the New York State College of Agriculture at Cornell, women were required to have SAT scores 30 to 40 points higher than those of entering men.

— A male applicant at Penn State was five times more likely to be admitted than a female.

Although Title IX outlawed these particular discriminatory practices especially in professional and graduate programs, the percentages of women enrolled in certain courses of study still fall short of full access to these programs. In 1980, the proportion of women in medical school was 26 percent; in law school [illegible]4 percent; in dental school 17 percent; and in veterinary school 39 percent. Women earned only 30 percent of doctorates awarded in 1980.

The problems in secondary and postsecondary education are even more severe, almost half of all programs are still overwhelmingly segregated by sex. Seventy-two percent of all women in vocational education in 1978 were still enrolled in predominantly female clerical programs or in home economics classes. The percentage of women enrolled in training that leads to higher paid typically male skills is still quite low. Seventeen percent in agricultural programs, 18% in trade and industrial programs, and 20% in technical programs.[1] These figures overstate the progress because these broad job categories include predominately female trades such as, cosmetology.

The importance of skill training for women for high paid jobs, usually reserved for men, cannot be underestimated. One half of all women in this country work, and two-thirds of them work out of economic necessity. With rising divorce rates, the economic cushion of a spouse's income can no longer be assumed. As noted by the National Advisory Council on Economic Opportunity, "Poverty among women is becoming one of the most compelling social facts of this decade. If the proportion of the poor who are in female-headed families were to increase at the same rate as it did from 1966-1977, the poverty population would be composed solely of women and their children in the year 2000."

Occupations historically reserved for women are undergoing enormous change. An estimated 80 percent of women currently working are now concentrated in occupations which are rapidly declining or becoming obsolete as a result of technological advances. Jobs such as bank teller, telephone operator and clerical worker are undergoing major changes. These changes will result in dramatically fewer available jobs in fields in which women have been concentrated and greater technological skill requirements in the remaining jobs. An unskilled woman will be displaced and may become permanently unemployed.

Moreover, a variety of forces have kept women out of predominatly "male" jobs. First and foremost is the fact that many jobs — e.g., plumber, electrician, auto mechanic — are still performed almost exclusively by men in our society. This fact alone deters many teenage girls from even considering such fields, or from employment even if they have been trained. Just as teenage girls do not try out for the high school football team or seek to join a "boys' only" school club or extracurricular activity, many do not even enroll for the auto mechanics course that only boys take.

Not only are there subtle societal norms that give young women implicit messages, girls are expressly discouraged from pursuing certain educational opportunities. Discriminatory counselors believe and tell girls that "dirty" work is not appropriate for them. Many counselors warn girls to avoid jobs in which they could face harrassment (verbal and physical) rather than counseling them how to avoid the harrassment. The result is that those girls who achieve academically despite this discouragement are likewise excluded from and discouraged in the job market. Women are harrassed in many job environments, and many employers refuse to consider hiring females for "male" jobs, such as plumbers, electricians, etc.[2]

The failure actively to recuit female students into traditionally male courses is sex-based discrimination in recruiting and training. It effectively endorses and perpetuates the pattern of discrimination that has kept women out of high-paying blue-collar skilled craft jobs. The notion that a girl should be discouraged or not encouraged in acquiring the special skills demanded by these changes, unless she herself exhibits an intense desire to do so, is economically catastrophic to women and fails to recognize the depth of the forces deterring her.

Women are also discouraged from courses of study in math and science with virtually the same force as they are discouraged from skilled jobs and vocational training. The stereotype that women are not good at math and science is still widely indulged even though these are extremely important areas of future employment. The result of this historic unfair exclusion of women from math and the sciences has proven difficult to overcome.[3] It is reflected in the counsel that girls receive as they choose a course of study.

There are severe consequences to the cultural bias that math and science are properly in the male domain. In 1981, only half of college-bound girls, compared to two-thirds of college-bound boys, had completed four years of high school math. The gap in enrollments, especially in advanced courses, persists despite the assistance of Title IX.

A study of math enrollments by the Project on Equal Educational Rights of the NOW Legal Defense in Education Fund in 113 school districts in Michigan in the fall of 1981 confirmed this pattern. Boys outnumbered girls two to one in computer math couses. In one school district the percentage of girls in computer math was as low as 22 percent. Girls were 40 percent of the students in calculus and 43 percent of the students in trigonometry. Advanced science courses had enrollments as low as 19 percent female.

This difference in course-taking is chiefly responsible for the lower achievement rates of girls that many studies have reported. While boys and girls tend to do equally well in math at elementary school levels, girls' math scores drop behind in junior high and fall further behind at the high school and college level. The disparity between boys' and girls' scores disappears, however, when the data are controlled for years of math taken in school. These findings confirm that it is primarily lack of exposure and practice that keeps girls behind boys' achievements in math and other technical studies.

The problem of women's exclusion from math training and their resultant loss of opportunity is exacerbated by the fact that sex segregated schools at the elementary and secondary level are tolerated under both Title IX and the equal protection clause of the Fourteenth Amendment. In 1977, the U.S. Supreme Court upheld on an equal protection challenge the exclusion of a Philadelphia girl from the all-male Central High,[4] one of the city's two academic high schools, and the one with the best reputation and the most prestigious graduates. The other academic school, the all-female Girls High, was good but, not quite on a par with "Central." The appellate court ruled in favor of "separate but equal", emphasized that Central and Girls High were comparable in quality, academic standing and prestige — and ignored the superior science facilities and reputation of Central. Last month, a Pennsylvannia state court ordered Central High to admit girls. However, that decision was based in part on the state Equal Rights Amendment.[5]

Schools for boys typically offer superior math and science opportunities. Girls, therefore, are often barred from entering programs in which math and science learning is required. The evidence confirms that girls, like most people gain confidence in their ability to perform a difficult task only after they have tried it.[6] The exclusion from a superior program of education can be fatal to any woman's development of interest and abilities in math and science.

Judging from the educational programs that prepare future professionals in these fields, women are likely to stay substantially underrepresented in scientific and technical fields. While the trend has been slightly upward over the last decade, young women are still enrolling in education for these fields in significantly smaller numbers than are men. For example, in 1980, only 30 percent of all college graduates specializing in computer and information sciences were women. There have been modest recent gains, but women are still a small minority in educational programs in these fields. In 1976, while women were 40 percent of the labor force, they held only 13 percent of the jobs in math, computer and life science. Women have historically been missing from other expanding career fields as well. In 1976, women held only 7.5 percent of the jobs in the physical sciences and one percent of the jobs in engineering.[7]

The implications of these statistics for the nation's future are staggering. At a time when our society is moving into an advanced technological era, we need to develop every citizen's ability to contribute. Instead, half the population is effectively excluded from these fields.

Sports and physical activity are another important area of student life that would be affected by the equal rights amendment. The strongly held stereotypes about women's athletic abilities have begun to be challenged. Today girls and women have more opportunity to participate in athletics — either for recreation or in competition — than they did before the passage of Title IX. But we have a long way to go.

Title IX has to date been interpreted to require institutions to provide a selection of sports and a level of competition that effectively accommodate the interests and abilities of both sexes. Women and men, boys and girls, must be provided comparable equipment and supplies, travel and per diem allowances, opportunity to receive coaching and academic tutoring, publicity, scheduling of game and practice times, scholarship aid, medical, housing, and dining facilities. Since the passage of Title IX the increase in womens' and girls' enrollment in athletic programs reflects the active desire that girls and women had for sports participation that was denied to them. However, the current data on girl's participation in athletics shows how far we have to go before programs reflect full and fair participation for women:

— Last year only 35% of the high school varsity athletes were girls.

— In 1980, the average budget for a woman's athletics program was 16.4% of the total athletics budget.

— During the 1977-78 school year, the average Big 10 school athletic budget for women was between $250,000 at smaller schools and $750,000 at larger schools. In the same year, however, the average men's Big 10 athletic was 3 million dollars.

While women still have a long way to go to achieve equality of opportunity in athletic participation, the gains in athletics for women are at risk today. The current Administration wants to severely limit Title IX in a way that would virtually eliminate athletics from coverage by that Act. For women to lose these gains would not only deny talented women careers in athletics. It would deny all young women the health, well-being and emotional and physical development that comes with sports and a full range of physical education participation. It would also guarantee that all women must continue to labor under the stereotype that women are innately weak, because as women continue to be denied opportunities for physical development and the incentives for that development, the stereotypes remain unchallenged and the talented athletic woman remains an aberration.[8] For girls, as much as for boys, physical development through athletics is a crucial part of their education. Today, we continue to deny our girls and women this access to a full education.

Women's Employment in Education.

My own experience is illustrative of the blatant discriminatory treatment of women employed in education until the very recent past. When I was a graduate student in the late sixties my department head informed me that there would be no financial aid for me. He argued that his statistics demonstrated that women doctoral students do not complete their degrees. I had to find financial assistance from other sources within the university in order to earn my degree.

In the early 1970's, when I became assistant professor in another college the chair of my department counseled me that I need not work so hard since the department had never and would never grant a woman tenure. My publications and teaching record, which he conceded were distinguished, would make no difference whatsoever. I left that institution to go to another institution that awarded me early tenure. Many other women were not so lucky.

With such active discouragement and stereotypic treatment of women in professional training, it is not surprising that the number of women teaching in higher education is low and many fewer of them are tenured. In the humanities, women are one third the number of men (14,500/42,200), and only 49.8 percent of those women are tenured. By contrast, the percentage of tenured males in the humanities is 76 percent. In the category of males aged 46 or older, 90.22 percent of those men are tenured in the humanities while, of all academically-employed female Ph.Ds aged 46 or over, only 68.7 percent are tenured. The situation is similar in the sciences. The number of women teaching in the sciences is one fifth the number of males (24,200/157,000), and only 37.6 percent of women as compared with 64.6 percent of men are tenured. Of all academically-employed male Ph.Ds aged 46 or older, 87.3 percent are tenured, while only 63.4 percent of women in that category are tenured.

The breakdowns do not change markedly for professors in the younger categories. For the humanities, in the age category 36 to 45 in which many would have become eligible for tenure in the last ten years, there are 17,700 males of whom 73.5 percent are tenured, and only 5,900 women of whom 45.7 percent are tenured. In the sciences, for the age category 36 to 45, there are 60,800 men who are academically employed, and 66.5 percent of them are tenured. Only 41 percent of the 9,200 women employed in the sciences are tenured. In the under 35 category, many have not yet come up for tenure. The humanities employed men (4,100) nearly twice as many than women (2,500). Furthermore, only 21 percent of the men are on nontenure tracks compared to 32 percent of the women. In the sciences, there are 31,200 men under 35 and 7,700 women. Of these, 30.4 percent of the men are on nontenure tracks compared to 40.4 percent of the women.[9]

Another way to examine the status of women's employment opportunities in higher education is to look at the percentage of women on full-time instructional staff during the period 1972 to 1983. There have been a small gain, mostly among women in the lower ranks. Women lecturers increased by 12% (from 34.4% to 47.1%); woman instructors increased by 13% (39.9% to 53.3%); women assistant professors increased by 12% (23.8% to 35.9%); and women associate professors increased by 5% (16.5% to 21.5%). But women full-professors increased by only one percent (9.8% to 10.8%). In all ranks combined the number of women increased by only five percent.[10] I speak from first-hand experience and observation when I say that even for the last ten years, the disparities are the product of continuing discrimination against women in higher education opportunities and employment.

The impact of these statistics is the loss of role models for young women and leaders for all women and lower wages[11] and less job security for women.

The pattern in higher education is not unique. Similar patterns are found in the employment of women in elementary and secondary education. A brief selection of the data will illustrate my point:

— While seventy percent of classroom teachers are female, only one percent of all head administrators of schools are female.[12]

— Male classroom teachers earn, on the average, $3,000 more per year than do female teachers.[13]

— Ninety-nine percent of school superintendents are male.[14]

— Women elementary school principals have decreased from fifty-five percent of all such principals in 1928 to eighteen percent in 1978.[15]

— Twenty-one percent of all vocational education administrators are women.[16]

We need the equal rights amendment to supplement the protections afforded by Title VII to women employed in educational institutions. Discrimination in professional employment, particularly in the granting of academic promotion and tenure is the most difficult area to challenge under current employment discrimination law.

II. Existing Laws Prohibiting Sex Discrimination in Education

At the present time, the principal laws relied on to redress sex discrimination in schools include Title IX of the Education Amendments of 1972, 20 U.S.C. Sections 1681-86, Title VII of the 1964 Civil Rights Act, equal rights amendments in state constitutions, and the Fourteenth Amendment to the U.S. Constitution. All of these provisions have major gaps in their coverage. Title IX provides "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." It covers most areas of school life including admissions, access to courses, counseling and testing, scholarships and awards, health and insurance benefits, treatment of unmarried students and students who are parents, access to housing and other facilities and employment. Title IX has been seen as the primary remedy for sex discrimination in schools and is largely responsible for beginning the important process of change toward equality for women in these aspects of education.

What are rarely addressed are the major gaps in Title IX's reach. Its provisions apply only to the admissions practices of vocational education, professional education, graduate higher education and to public undergraduate higher institutions.[17] In other words, the statute does not prohibit sex-based discrimination in admissions — whether a complete bar to women's enrollment, a quota, or a demand for higher qualifications — in all the nation's elementary and secondary schools, private colleges, and even public colleges, if they have always excluded persons on the basis of sex. These are not minor exceptions. They go to the heart of discrimination in education. Girls and women can be denied equal access with boys and men to all educational opportunities at certain institutions even with Title IX. The statute now precludes a Title IX claim against sex-segregated elementary and secondary schools, or against a school district that imposes different entrance requirements on the basis of sex.[18]

Sex segregation in schools can be extremely detrimental to girls and boys, reinforcing sex stereotypic roles which artificially limit the options of both. The Vorchheimer case showed Philadelphia reserving its best science preparation for the boys who could attend "Central" — those who could be future leaders of the nation.[19] The girls attending "Girls High" presumably did not need superior science instruction. Similarly, the all-female Winthrop College in South Carolina was set up to prepare women for:

> . . . stenography, typewriting, telegraphy, bookkeeping, drawing, . . . designing, engraving, sewing, dressmaking, millinery, art, needlework, cooking, housekeeping, and such other industrial arts as may be suitable to their sex and condusive to their support and usefulness.[20]

Men at the companion state college, The Citadel, are prepared for careers in engineering and the military. When the University of Virginia at Charlottesville was reserved for men, great disparities between the state's male facilities and the female facilities were revealed in litigation.[21] The men's college offered the highest average faculty salaries in the state. The state appropriation per student at the men's college was more than double that at each of the two women's colleges. Men had access to sophisticated astronomy and science facilities; women did not. Men could take degrees in astronomy, Latin-American studies, and nine foreign languages — all unavailable to women. The men's college offered a far greater variety of courses in almost every department, especially in government, astronomy, economics, English, history, physics, geology, geography, sociology and anthropology. In short, the lawyers showed in detail that the state reserved its highest-quality educational facilities "For Men Only."

Yet these kinds of blatant violations are immune from attack under Title IX.

The primary weakness of Title VII to redress discrimination against academically employed women is the reluctance of federal judges to closely examine university hiring, promotion and tenure procedures. While I do not advocate a judicial takeover of academic decision making, the equal rights amendment would require closer judicial scrutiny of these procedures. It would force colleges and universities to examine their own policies and affirmatively to remove artifical barriers to women's employment and advancement.

Other major laws concerning equality for women in education are state equal rights amendments. Only sixteen states[22] have equal rights provisions in their constitutions. The cases under state ERAs demonstrate that the federal ERA will be an effective tool for all women seeking an equal education.

The United States Constitution as it is presently interpreted is of only limited utility to overcome sex discrimination. For example, the Supreme Court did strike down the exclusion of men from a state university nursing school, but it did so with a closely divided court.[23]

The charter of Mississippi University for Women underscores the sex stereotypic nature of the school:

> The purpose and aim of the Mississippi State College for Women is the moral and intellectual advancement of the girls of the state by the maintenance of a first-class institution for their education in the arts and sciences, for their training in normal school methods and kindergarten, for their instruction in bookkeeping, photography, stenography, telegraphy, and typewriting, and in designing, drawing, engraving, and painting, and their industrial application, and for their instruction in fancy, general, and practical needlework, and in such other industrial branches as experience, from time to time, shall suggest as necessary or proper to fit them for the practical affairs of life.[24]

This example also serves to demonstrate that sex discrimination is often a two-edged sword. When men's opportunities are limited, there is usually accompanying discrimination that limits women based on cultural stereotypes about their abilities. With the Equal Rights Amendment, unless the purpose of sex segregation is to implement principles of affirmative action and to create equal access to full educational opportunities, single sex schools that deny women access to any educational facilities and teaching would be outlawed. Of course, in private educational institutions where sex segregation serves specific religious principles or purposes, (as distinguished from educational purpose), the equal rights amendment would not abrogate the First Amendment right to freedom of religion.

III. The Equal Rights Amendment Eliminates the Option of Discrimination on the Basis of Gender in Education and In Other Areas of Public Life

The effect of the Equal Rights Amendment on education is simple. The choice of whether to discriminate on account of sex in education will no longer be an option.

This means that unless educational policies are justified by principles of affirmative action, schools must treat males and females the same. Every legislator, federal and state executive and administrator, every educational policy-maker, every school board, every educator and teacher will receive the clear and final message that discrimination on account of sex will not be permitted. The ERA will establish equality on a permanent basis in a way not subject to the vagaries of administration policy. This is important since the alternative of prohibiting sex discrimination statute by statute, as Congresswoman Barbara Mikulski says, "is a little like eliminating slavery plantation by plantation."

The ERA will do much more than any statute to ensure enforcement. Although Title IX was passed in 1972, it was not fully enforced by the government as was contemplated. For years, HEW, now the Department of Education, failed to comply with regulatory requirements of prompt resolution of complaints, and compliance reviews were often incomplete. In 1974, a lawsuit was brought against HEW and the Department of Labor for failure to enforce laws prohibiting sex discrimination in schools. That suit resulted in an order requiring strict enforcement time frames.[25] After a contempt motion, the order was reaffirmed and strengthened, but this Administration is challenging it on appeal. In short, federal enforcement of Title IX has never been rigorous.

The ERA will provide a constitutional backdrop to statutory provisions against sex discrimination as well. This constitutional backdrop has much more than symbolic value. One court has held that women's rights under Title IX are due lesser consideration and enforcement than rights guaranteed under Title VI, because, the court reasoned, Title VI is premised on the Constitution while Title IX is merely statutory.[26]

The ERA will also afford each woman a right to unqualified equality. A statute, like Title IX, is the product of political trade-offs, and the resulting statutory scheme is riddled with exceptions and limitations on remedies. With the ERA, a woman's right to equality will no longer be part of the bargain. The result: Congress will no longer be assailed by lobbyists to minimize women's rights particularly in education.

Finally, the ERA will blunt the initiative of those who would reject the equality principle and lock women into second place in education and elsewhere. I mentioned that Title IX was not vigorously enforced by prior national administrations and that, fortunately, individuals were able to assert their rights by private lawsuits. Now women face more than neglect in the government's enforcement of Title IX. Officials of the current administration have launched a concerted effort to severely limit the scope and effectiveness of Title IX by revising the Department of Education regulations enforcing Title IX, by the Department of Education's refusal to appeal an unfavorable court interpretation of that statute,[27] and, finally, by advocating the extremely narrow interpretation in the Department of Justice brief to the Supreme Court in Grove City College v. Bell, now pending.

This administration's objective is to subject to Title IX only those institutions that receive federal funds earmarked for narrowly defined specific educational "programs", and to exclude from coverage institutions that receive federal aid for more general purposes. For example, this administration has claimed that federally guaranteed school loan funds no longer trigger an obligation to comply with Title IX. These moves represent a clear strategy to turn back the clock on women's rights by reducing the number of schools covered by Title IX, and limiting educational opportunities and activities which women are guaranteed access to by statute. Many academic programs, including athletics, will be hard hit by the proposed interpretation of Title IX.

Senators, the Equal Rights Amendment would make women's right to equality no longer a political football. For those of you who share the view that women are entitled to equality, the ERA would free you and your colleagues in the House, and members of executive and legislative branches in most states throughout this nation, to debate the most efficacious and cost effective means to implement women's right to equality, not whether they are entitled to that equality. That, I believe, is what the vast majority of you would like to do and what the vast majority of Americans, would like you to do.

ENDNOTES

1. National Center for Educational Statistics, Department of Education, 1980.

2. For an in-depth analysis of the various factors in operation, see R. Friedman & T. Huling, Their Proper Place: A Report on Sex Discrimination in New York —exploring the forces that lead to continued de facto segregation of New York City's vocational high schools once the explicit legal bars were dropped.

3. National Research Council, Climbing the Ladder: An Update on the Status of Doctoral Women Scientists and Engineers (National Academy Press, 1983).

4. Vorchheimer v. School District of Philadelphia, 532 F. 2d 880 (3rd Cir., 1976) aff'd by an equally divided court, 430 U.S. 703 (1977).

5. Newberg v. Board of Public Education, (Court of Common Pleas No. 5822, August 30, 1983).

6. See, e.g., MacDonald, An Experiment in Mathematics Education at the College Level, in Women and the Mathematical Mystique, 115 (Fox, Brody & Tobin, eds., 1980).

7. Among those areas of employment growing at a rapid rate are ones requiring math and computer training. The Bureau of Labor Statistics projects 48,250 openings in the mathematics/computer sciences field each year through 1990. The demand for electrical and computer engineers will exceed supply by amost 40,000 by 1985, according to the National Engineering Manpower Project of the Electronic Industries Association. The U.S. will experience a shortage of 577,000 computer operators, systems analysts and technicians by 1990.

8. The popular support for participation of girls and women in athletics is quite strong. A study by Seventeen magazine showed that 99.9% of all high school girls surveyed now participate in some form of athletic activity. A recent Harris poll demonstrated that 93% of parents of high school students want their sons and daughters to participate in sports. For a more thorough discussion, see United States Commission on Civil Rights, More Hurdles to Clear: Women and Girls in Competitive Ahtletics (July, 1980).

9. See, National Academy of Sciences/National Research Council, Science, Engineering, and Humanities Doctorates in the United States, 1981 Profile (1982), reprinted in Scientific Manpower Commission, Professional Women and Minorities, Tables 5-12, 5-13 at 113 (June, 1983).

10. See Scientific Manpower Commission, Professional Women and Minorities, Talbe 5-25 at 125 (June, 1983) (statistics from National Center for Education Statistics).

11. Female higher education faculty earn an average of $4,000 less per year than male faculty according to the 1980-81 salary survey in the Chronicle of Higher Education.

12. American Association of School Administrators, 1980.

13. National Education Association, 1979.

14. American Association of School Administrators, 1980.

15. National Association of Elementary School Principals, 1978.

16. Office for Civil Rights, 1979

17. See 20 U.S.C. Section 1681 (a) (1). See also 34 C.F.R. Section 106.15.

18. A additional federal statute is the Equal Educational Opportunities Act, 20 U.S.C. Sections 1703-1758, whose general purpose is to ensure that all children enrolled in public schools are given "equal educational opportunity without regard to race, color, sex, or national origin . . . ." 20 U.S.C. Section 1701 (a). However, another section prohibits race segregation of students, but not sex segration of students, and there is thus a conflict in the courts as to whether sex segregation is forbidden by that statute. Compare Vorchheimer v. School District, 532 F. 2d 880 (1976) aff'd men. by an equally divided court, 430 U.S. 703 (1977), with United States v. Hinds County School Board, 560 F. 2d 619 (5th Cir. 1979). Accordingly, this federal statute does not clearly address still very important areas of sex discrimination.

19. Judge Marutani, in the recent Pennsylvania state court decision admitting girls to Central High, emphasized the vast superiority to "Central's" facilities over those at Girls High. Newberg v. Board of Public Education. (Court of Common Pleas, No. 5822, August 30, 1983)

20. Williams v McNair 316 F. Supp. 134 (D.S.C. 1970).

21. Kirsten v. Rector and Board of Visitors of the Unviversity of Virginia, 309 F. Supp 184 (E.D. VA. 1970)

22. The states are Alaska, Alaska Const. Art. I, Section 3; Colorado, Colo. Const. Art. II, Section 29; Connecticut, Conn. Const. Art. I, Section 20; Hawaii, Hawaii Const. Art. I, 512; Illinois, Ill. Const. Art. I ? 18; Maryland, Md. Const. Art. 46; Massachusetts, Mass. Const. Part 1, Art. I; Montana, Mont. Const. Art. II, Section 4; New Hampshire, N.H. Const., Part 2, Art. II; New Mexico, N.M. Const. Art. II, Section 18; Pennsylvania, Pa. Const., Art. I, Section 28; Texas, Tex. Const., Art. I, Section 3; Utah, Utah Const. Art. IV, Section 1; Virginia, Va. Const. Art. I, Section 11; Washington, Wash. Const. Art. XXXI, Section 1; and Wyoming, Wyo. Const. Art VI, Section 1.

23. Mississippi Univerisity for Women v. Hogan, 102 S.Ct. 331 (1982).

24. Miss. Code Ann. Section 37-117-3 (1972).

25. Women's Equity Action League v. Califano, No. 74-17220 (D.D.C. Dec. 29, 1977).

26. Hillsdale College v. Department of Health, Education and Welfare, 696 F.2d 418, 419 (6th Cir. 1982).

27. University of Richmond v. Bell, 543 F. Supp. (E.D. Va.,1982)

Senator HATCH. Thank you, Dr. Shalala.

Let me just before we begin questions, I would respectfully ask both witnesses if you could be as directly responsive to questions from members of this subcommittee as possible. What we are attempting to do is create an instructive legislative history on this extermely important amendment, and I would hope that we would focus on each issue in turn. Now, with only two witnesses today, I am confident that there will be more than adequate opportunity for both of you to make those points which you believe are the most important each question that we ask. I would hope, however, that in order to create a useful legislative record on the ERA, we will deal with each issue in an orderly and systematic manner.

Both of you have emphasized the importance of title IX as an existing tool for combatting sex discrimination at both private and public schools. Both of you, as well, have pointed out the exceptions that currently exist in title IX. One of these relates to the admissions policies of private secondary schools and colleges. Presently, as you know, title IX does not require all federally assisted private schools and colleges to adopt a sex-neutral admissions policy.

Now, I would like to ask each of you this morning, and we will begin with you, Dr. Shalala, this question. If the ERA becomes part of the Constitution, would this exception be permitted? In other words, would the ERA require all federally assisted institutions—all private schools and colleges receiving any form of Federal funds—to become coeducational? Would single-sex schools and colleges be permitted to receive Federal assistance?

Dr. SHALALA. The answer is "No," Senator. There would be an exception, I believe, for the women's colleges, for example, which demonstrated that they continued for the purposes of eliminating past discrimination and for affirmative action.

Senator HATCH. Would that be the only exception?

Dr. SHALALA. That would be the only exception that I could think of. Men's single-sex colleges would be eliminated under ERA.

Senator HATCH. In other words, if I understand you correctly, you are saying that the only exception under the ERA would be for those single-sex women's colleges that are set up specifically for the purpose, or that in fact promote the purpose of eliminating past discrimination.

Dr. SHALALA. Exactly.

Senator HATCH. But all other single-sex institutions would either be abolished or they would lose their tax exemptions——

Dr. SHALALA. Well, Senator, let me make one more exception. I assume we are talking about educational institutions, not about religious training institutions.

Senator HATCH. Yes.

Dr. SHALALA. As long as we are talking about educational institutions, then my statement stands, that the single exception would be the women's colleges who could pass a strict review of their goals and programs.

Senator HATCH. In other words, a religious school or a school sponsored by a religion that required a single-sex policy so far as education is concerned would be abolished or lose its tax exempt status?

Dr. SHALALA. Well, no.

Senator HATCH. But you would limit your exemption to schools that teach exclusively religion. What if an institution also offered regular academic courses and degrees?

Dr. SHALALA. The *Bob Jones* decision, it seemed to me, distinguished between religious institutions and educational institutions including those essentially educational institutions which had some religious purpose. And in the case of *Bob Jones*, while the court did not compel the IRS to remove their tax exemption because of racial discrimination, it did say that the IRS could. I would not expect the court to go beyond that, and that is to give the IRS the option in the case of sex discrimination if the ERA took place. The major distinction would be that single-sex women's institutions, which provided a justification based on affirmative action or eliminating previous discrimination, would be allowed.

Senator HATCH. Are you saying that all male single-sex institutions would have to be abolished?

Dr. SHALALA. That is right.

Could I say one thing about those male single-sex institutions, because I think it is important that we put on the record how many institutions that we are talking about.

Senator HATCH. Surely.

Dr. SHALALA. There are about, I believe, 100 male single-sex institutions; 90 percent of them are not educational institutions at all, but religious training institutions for priests or rabbis. There are 10 private institutions in this country that are single-sex for men. Those are the ones that would be directly affected by the ERA. There are two public institutions, VMI and the Citadel. Since the U.S. military academies are already integrated, there is nothing to demonstrate that those two institutions as public institutions should not be integrated, and they may well be, depending on one's interpretation of the *Mississippi* case. So that we are not talking about a very large number of institutions or a major impact on education; on 90 percent of the educational institutions in the country.

In the case of women's institutions, we are talking about 125,000 students, about 1 percent of the total educational institutions in this country. I know a great deal about the women's colleges in this country. In the last 2 years, there have been inaugurations of two presidents of Wellesly and Barnard, and both of them in their inauguration addresses clearly laid out why those institutions would continue to exist, and the outlines of those inauguration addresses would be the outlines that they would provide in their defense for existing under an ERA, and I see no significant problems with that.

Senator HATCH. OK. Professor Rabkin, would you care to comment on these questions?

Professor RABKIN. Yes; I am astonished by Dr. Shalala's claim that single-sex institutions would be allowed to receive Federal aid—and that, I think, is what we are talking about here, Federal aid and tax exemptions, and not whether they can exist at all, though I may have misunderstood.

But in any case——

Senator METZENBAUM. Could you repeat that, Professor Rabkin? I did not hear what you just said.

Professor Rabkin. Yes; I actually would like some clarification of what Dr. Shalala was saying. It seems to me the ERA will not directly prohibit single-sex institutions if they are private. It seems to me what we are talking about is State involvement with private institutions.

Senator **Hatch.** Would you care to comment?

Dr. **Shalala.** Mr. Rabkin's point is fair, it seems to me, but I just do not know of any institution in the country in which there is not public involvement, whether it is tax exemption, direct aid, student aid—I may have missed one or two, but basically——

Professor **Rabkin.** But the point is you could continue your institution and give up your status.

Dr. **Shalala.** Yes, absolutely. You are absolutely correct, yes.

Professor **Rabkin.** OK.

Dr. **Shalala.** But since I did not know of any cases of that, I did not begin by saying that, but he is absolutely correct, that an institution that wanted to remain single sex, male single sex, could give up tax exemption, direct guaranteed student loans, and any other public involvement or public moneys and remain single sex.

Professor **Rabkin.** Yes; some people have argued otherwise, but I would agree with Dr. Shalala, that the most likely interpretation is that if you are willing to exist as a pariah, and as a pauper, you can continue in your evil ways and be a single-sex institution, even under the ERA.

What I wanted to take issue with was the claim that some kind of affirmative action principle will make it all right for all women's colleges to continue to get tax-exempt status and other sorts of Government aid. With all due respect, I do not think the president of Smith College or Hunter College is in a position to write the legislative history of this amendment or is in a position to decree what are correct interpretations of the Constitution. There is simply no parallel doctrine with regard to race discrimination. Neither the Department of Education, the Justice Department, nor any court, so far as I am aware, has ever said, "If you want to be an all-black institution for affirmative action reasons, that is all right, and you can exclude white applicants." There are, in fact, many colleges which were founded decades ago as part of segregated State systems and were, to begin with, all black, and the Federal Government is now going to great trouble to try to integrate those institutions, force them not only to admit whites, but to undertake various activities which will make them more attractive to white students.

Since racial segregation is not allowed even for affirmative action reasons, I cannot understand what justification there could be for saying, "Well, we will allow it in the case of sex discrimination, because some women think it is good for them." That seems to me to be trying to have your cake and eat it, too.

Senator **Hatch.** Dr. Shalala.

Dr. **Shalala.** If I may respond to that, I know of no evidence that the Federal Government is trying to integrate all-black private institutions in this country. There certainly is activity in relationship to public black institutions, but I do not have any evidence—and maybe Mr. Rabkin has it—that as Government policy, we are trying to integrate private black institutions in this country. And I think there is some history with those black institutions that would be helpful.

My point about the women's colleges could be expanded. I have argued that it would be possible for them under the ERA to continue their single-sex admissions policy if they could make a case that they were making a positive contribution to overcoming the effects of discrimination and promoting sex equality. The alternative for them would be to stay as women's colleges, but to admit men; that is to say that men are also welcome to come to those institutions. A number of the women's colleges in this country do have men on their campuses for programs or as part of a sharing operation. That would be another alternative.

Senator METZENBAUM. Dr. Shalala, I am disturbed, and I am frank to admit it. The disturbance arises from the fact that I am opposed to discrimination, whether it is women discriminating against men, or men against women, or blacks against whites, or whites against blacks or pinks, or whatever the case may be. And you advance a rather intriguing judicial concept that I think Dr. Rabkin is addressing, and you answered by saying, "I know of no instance of any effort on the part of Government to integrate black schools."

Dr. SHALALA. Private schools.

Senator METZENBAUM. Private schools. But that does not seem to me to be the real issue. The real concern that I have is what judicial precedent do you find for saying that it is OK for women's schools to discriminate, but not for men's schools to discriminate, and further, that if all women's schools were established to eliminate past discrimination—I would guess that not many schools that have been opened in recent years would fit into that category, but if a college was established 150 years ago for that purpose, that would justify the present-day discrimination. And I must tell you that, as you well know, I am a strong supporter of ERA, but I am not sure that I follow this legal approach of yours. I have special regard for you since you are a former Clevelander, and anybody who comes from Cleveland has a special warmth in my heart, and we take pride in your accomplishments, but that does not mean I have to agree with you if I am not sure you are right.

Dr. SHALALA. Fair enough, Senator.

Senator HATCH. Dr. Shalala, how do you distinguish between all women schools based upon affirmative action precepts and all women's schools which are not? I think this goes along with Senator Metzenbaum's question.

Senator METZENBAUM. Yes.

Senator HATCH. Who makes those determinations?

Dr. SHALALA. Well, I think the court would end up making that determination.

Senator HATCH. So we are going to let the courts determine which schools can receive Government aid?

Dr. SHALALA. Senator, since I am not a lawyer, let me end on this point. I said that there was a possibility that if the women's colleges—that one way the women's colleges could remain as women's colleges is if they could demonstrate that they were making a positive contribution to overcoming the effects of discrimination; that there was a possibility that under those narrow guidelines, they could remain single sex and still get public aid.

If I remember correctly in my reading of the Mississippi case, in *Mississippi University for Women* v. *Hogan*, the Court did say that you could have affirmative action as a justification for sex segregation, but only on a narrow——

Senator **Hatch**. That was in a case involving public schools, though.

Dr. **Shalala**. The other thing is that there would be time limitations on this. What I am suggesting under the ERA is that for a period of time until there was, in fact, demonstrated equality, for affirmative action purposes, if an institution or a program demonstrated that it was there for the purposes of overcoming past discrimination, it could exist for that period of time.

Senator **Metzenbaum**. Dr. Shalala, I want the Supreme Court to understand—and I assume that we will pass ERA this year, it will be ratified this year, and it will be to the Supreme Court within the following year—that this strong advocate of ERA is not at all in agreement with the suggestion that it is justifiable for women's schools to discriminate and for men's schools not to be permitted to discriminate. I think that ERA would not justify or legalize discrimination.

Senator **Hatch**. Senator, would you be willing to write that into the law itself, so that there is no question about it?

Senator **Metzenbaum**. That really would not bother me, and I could not really believe that women's organizations, who are obviously the strongest advocates of this legislation, would attempt to preserve the right to discriminate in contradistinction to their opposition to men's schools, or nonmen's schools, nongeneric schools, discriminating. I think it is evident from your testimony, as well as from the facts, that they do at the present time. That is bothersome to me.

Dr. **Shalala**. Senator, my point was only to overcome the effects of past discrimination.

Senator **Metzenbaum**. How do you prove that? How do you prove it?

Senator **Hatch**. That is my question, as well. Let me ask a different question along the same lines that might clarify it. You make clear that programs of affirmative action which provide preferences to women would be exempt under the ERA. Now, I would like you to elaborate on that. For instance, I thought that you said that the key to understanding the ERA was unqualified equality.

Dr. **Shalala**. That is correct.

Senator **Hatch**. Now you seem to be qualifying that equality already, or do I misunderstand?

Dr. **Shalala**. I made only one qualification.

Senator **Hatch**. And that is that single female sex schools——

Dr. **Shalala**. Or programs.

Senator **Hatch** [continuing]. Or programs that are designed to overcome the effects of past discrimination. These would be permitted, and then only for a reasonable period of time.

Dr. **Shalala**. For a period of time, yes.

Senator **Hatch**. But all other schools would be abolished.

Dr. **Shalala**. Yes.

Senator HATCH. OK.

Yes, Dr. Rabkin. We do not mean to be ignoring you. Go ahead.

Professor RABKIN. I still want to take issue with Dr. Shalala's account of this. I do not know of any judicial precedents in the race area which support this interpretation. And furthermore, I don't see the point of Dr. Shalala's compromise suggestion, which is that, well, fine, we can have women's colleges which will just admit some men on the side. Now, it seems to me if you want to have a women's college, you want it to retain its character——

Senator HATCH. But it would still be known as a women's college, she said.

Professor RABKIN. Right, and I do not understand how that could be done.

Senator HATCH. Under ERA, you are saying?

Professor RABKIN. In real life, unless you admit men on some kind of a restrictive basis. That is, you say, we want primarily to be a women's college but we will have some men. Therefore, we will set aside 20 percent of the places, 30 percent, 10 percent, whatever it may be. Once you throw open admissions to everybody, I do not see how you can claim that it is still a women's college except by saying it is somehow in spirit still a women's college, although it is completely coeducational. At that point, it might even be discriminatory to say it is in spirit more partial to half of the students than the other half.

Senator METZENBAUM. That is just a name. Whether it was called a women's college or a men's college, if they were indeed accepting men as well as women, then I think the name would be quite unimportant.

Professor RABKIN. Fine, Senator. But at that point, it seems to me it is not a women's college. And I believe Dr. Shalala's suggestion was that one could somehow compromise this and admit some men, and that would be enough to qualify you for State aid under the ERA. And I do not think that is true. I think you would have to be completely, rigorously impartial.

Senator HATCH. Let me ask my colleague, Senator Metzenbaum, so that we have it on the record, are you basically saying that we should do away with all single-sex colleges under the ERA? That is what I interpreted you to say, that there should be no distinctions and no exceptions.

Senator METZENBAUM. That would be my attitude, that if you are going to eliminate discrimination, you eliminate it. Now, I do not know any better justification for men's colleges than there is for women's colleges being single-sex colleges. I can understand the distinction with respect to religious institutions, but I do have great difficulty in preserving the right of women's colleges to keep out men. Some of them are pretty nice people. [Laughter.]

Dr. SHALALA. A lot of them, Senator.

Senator HATCH. Let me go to another question, because we could spend all day on that, I suppose. Let me discuss another important exception in title IX. Title IX presently exempts any school controlled by a religious organization to the extent that the prohibition on sex discrimination would be inconsistent with its religious tenets. Would this exception continue to be constitutional if the ERA is ratified, Dr. Shalala?

Dr. SHALALA. I think that in *Bob Jones*, the Court was very careful to distinguish between educational institutions and religious institutions, and single-sex seminaries would be allowed; religious activities that discriminated within institutions would be allowed, but that educational institutions sponsored by religion would not be able to get Government aid.

Now, they would not be compelled to lose tax exemption according to the *Bob Jones* decision, but they would not be able to get Government aid under the ERA.

Senator HATCH. Dr. Rabkin?

Professor RABKIN. I disagree with that. First of all, I think it is clear from the *Bob Jones* decision that this is not up to Congress or the IRS: that the Constitution itself, under the ERA, the ERA as part of it, would require that you deny tax-exempt status to single-sex institutions. That is one. Second, I think Dr. Shalala really is not accurate in saying that the *Bob Jones* decision makes a big distinction between educational institutions which happen to be religious and religious institutions which happen to be educational.

Senator HATCH. Well, all religious institutions happen to be educational, don't they?

Professor RABKIN. Exactly.

Senator HATCH. Hebrew universities, seminaries—I do not see how you make the distinction?

Professor RABKIN. Exactly. I do not either, and I do not think the court was making any effort to make that distinction.

Senator HATCH. If the Court allowed the IRS to remove Bob Jones' tax exemption, notwithstanding the exception in title IX for religious institutions, what do you think would happen if the ERA was ratified thus raising the issue of sex to the same suspect classification level as race?

Professor RABKIN. Right. I do not think there is any question that under the ERA, institutions which maintain any kind of religious practice that distinguishes between the sexes, those institutions would have to lose their tax exemption. I really do not think there can be question on that.

Senator HATCH. Do you agree with that, Dr. Shalala?

Dr. SHALALA. I agree with that, but I do not agree that seminaries would be covered under that. I believe the first amendment would prevail in this case.

Senator HATCH. You believe that seminaries would not be covered under the ERA. But, Senator Tsongas, when he was here, asserted that the courts would have to balance the first amendment issue and the ERA issue. Do you agree with that?

Dr. SHALALA. Yes.

Senator HATCH. Do you agree with the general rule of constitutional interpretation, that the last amendment in time would tend to be the controlling amendment?

Dr. SHALALA. No.

Senator HATCH. You would not agree with that as a matter of constitutional interpretation?

Dr. SHALALA. I think the first amendment would prevail in this case.

Senator HATCH. How would you distinguish the first amendment issues in this question from those involved in the *Bob Jones* case?

Professor **Rabkin**. Could I——

Senator **Hatch**. Sure, Dr. Rabkin. Go ahead.

Professor **Rabkin**. This is why I think it is important to remember that we are not talking about a direct prohibition against this institution operating at all. I believe what we are talking about is just the question can they retain tax exemption, can they retain other kinds of government benefits. OK. If that is the way you frame the question—and I agree with the previous formulation by Senator Tsongas, that the courts would be balancing first amendment claims to religious liberty against the need to preserve sexual equality—if you do this balancing, and what you are balancing is, on the one hand, this overriding constitutional requirement that we not in any way give any kind of government benefits to sex discrimination, and on the other hand, the institution is interested not directly in practicing its religion but just in retaining some government benefit, I think almost every time the Court has generally decided the way it did in *Bob Jones,* which is, "Too bad. If you have this kind of religion which offends our constitutional principles regarding sexual equality, if that is your religion, we may let you practice it, but we will not allow you to be subsidized."

Senator **Hatch**. That is basically what the *Bob Jones* case says.

Go ahead, Dr. Shalala.

Dr. **Shalala**. Senator, it seems to me that if you believe that, you have to believe that churches, synagogues, other kinds of institutions in this society that practice discrimination for religious purposes would also lose their tax exemption. And they do not. I mean, that is why I suggest to you that——

Senator **Hatch**. You see, that is one of the genuine questions, Dr. Shalala, whether they will or will not. The ERA is absolute in its language. It means that the issue of sex would be elevated to the level of a suspect classification; we only have three suspect classifications under constitutional law right now—race, religion, and national origin. If you create a fourth, virtually any distinction based on sex would be stricken down as unconstitutional.

You do not disagree with that, do you, Dr. Rabkin?

Professor **Rabkin**. Well, the one qualification I would add is that on the race discrimination side, the courts do seem to distinguish between educational institutions and other kinds of institutions. They have not said that actual churches should be denied tax exemption if they practice race discrimination. They have not gone that far though I am not sure anyone has ever tried to bring such a challenge—I mean to the tax exemption of racially discriminatory churches. But courts have said religious schools should be denied tax exemption if they practice race discrimination. Now, I am not sure whether the Supreme Court really intends to make that distinction, between churches and schools, or why they would. They may think that education is much more important and is, in a way, much more public, even if it happens to be a private school. If you assume that this will be carried into the ERA—and I think that is a plausible assumption—then you are not talking about churches per se losing their tax-exempt status, but just church schools. But that already seems to me a considerable threat to religious activity, since it seems to me it is very important to most organized religions to maintain certain kinds of educational institutions.

Dr. **Shalala**. But the key, Senator, is whether you believe that the Court would consider a single-sex seminary to be covered under the first amendment, or whether it would see it as an educational institution. In my judgment, it would see it as an organization of religion rather than an educational institution.

Senator **Hatch**. Well, I hope you are right, but nobody can say for sure.

Dr. Shalala, have you been affiliated with the NOW Legal Defense Fund?

Dr. **Shalala**. No.

Senator **Hatch**. You have not been. Well, let me read a NOW resolution which I think touches on this issue. It says:

> In light of the enslavement of body and mind, which the church historically has imposed on women, we demand that the seminaries (a) immediately stop and repudiate their propagation of sexist male supremacist doctrine; (b) initiate women's studies courses which cut through the traditional male religious mythology to expose church and other social forces denying women their basic human dignity; (c) actively recruit, employ and justly promote women theologians and other staff in all departments; (d) actively recruit, enroll, financially aid, and seek equal placement for women theological students.

Do you agree or disagree with that?

Dr. **Shalala**. Well, Senator, I do not think that my personal view on religion and the integration of religious institutions is relevant to a hearing on the ERA in education. I do not think the ERA covers the NOW statement, or their views on whether the Catholic Church—and I happen to be a Catholic—ought to allow women to be priests, or whether there ought to be women rabbis in the Orthodox Church. I mean, I happen to very much want my church to make women priests, but I just do not think it has anything to do with educational policy in this country.

Senator **Hatch**. Let me go back to the *Bob Jones* case in some more detail.

Following the Court's decision in *Bob Jones,* would as Professor Rabkin suggests, all single-sex institutions be denied tax exemptions?

Dr. **Shalala**. What the court said in *Bob Jones* is that the IRS can, but is not compelled to, remove tax exemption for educational institutions that discriminate on the basis of race. I would expect the court to do no more and no less than that on the subject of sex. But I keep wanting to repeat that we ought to be very precise about what the case said, because the court did not mandate—it was short of a mandate, for the removal of tax exemption. It simply gave the option to the IRS——

Senator **Hatch**. So, the IRS could remove the tax exemption at their discretion.

Dr. **Shalala**. Yes.

Senator **Hatch**. In any case.

Dr. **Shalala**. Yes.

Senator **Hatch**. Dr. Rabkin.

Professor **Rabkin**. I do not think that is an accurate characterization. It is true that the court did not go the last step and say, "This is absolutely required by the Constitution, whatever Congress may say about it." But it went to very great lengths to attribute to Congress an intention which was by no means obvious as having been congressional intention, and it did so, I think, rather openly for the reason that it regarded this as being required by the Constitution, and therefore, something which could be attributed to Congress.

Let me just add one other thing to your previous question about the effect on private institutions. I think you are talking, in the *Bob Jones* case, not about a single-race institution, but an institution which has a fairly peripheral policy that is racially discriminatory, and that seems to me the thing which is most striking about the case and most alarming about its implications for the ERA. It does seem to me you are not simply talking about single-sex institutions, but institutions which maintain some kind of sexual policy, even if it is in a fairly peripheral aspect of the school's operation. I gave the example at the beginning of an orthodox Jewish school that has some kind of religious service in which men and women are separated. It seems to me under the *Bob Jones* case, that would be enough for that school to lose its tax exemption, even if it is a coed school in all other respects.

Senator HATCH. The chairman of the full Judiciary Committee would like to put something in the record, and then I am going to turn to Senator DeConcini, the ranking minority member, as soon as Senator Thurmond is through.

The CHAIRMAN. Thank you, Mr. Chairman. Mr. Chairman, I ask unanimous consent that my opening statement follow yours in the record, if there is no objection.

Senator HATCH. Without objection, we will put that in the record.

The CHAIRMAN. Now, I have some questions for Dr. Shalala, and Prof. Jeremy Rabkin, and if you would answer these for the record, we would appreciate it.

Senator HATCH. We will submit those to you in writing, and if we could have your answers as soon as possible, we would appreciate it.[1]

The CHAIRMAN. We have a hearing on the Korean plane that was shot down, and I will have to go to that, but I want to thank you for your appearance here, and we appreciate the answers for the record.

Thank you, Mr. Chairman.

Senator HATCH. Thank you.

Senator DeConcini?

Senator DECONCINI. Mr. Chairman, thank you for letting me intervene at this time. I have a statement submitted for the record. and I also have some questions, Mr. Chairman, that I would like to submit to the witnesses, if they would be so kind as to answer them.[1]

Senator HATCH. Without objection, we will submit those questions, as well.

[Prepared statement follows:]

PREPARED STATEMENT OF SENATOR DENNIS DECONCINI

I would like to thank Chairman Hatch for calling this hearing on the Equal Rights Amendment, and I welcome today's witnesses, Donna Shalala and Jeremy

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[1] The questions and answers begin on page 160.

Rabkin. I trust that today's hearings will go a long way in alleviating the concerns of many about the impact of the Equal Rights Amendment.

Without a doubt, the ERA is one of the most important pieces of legislation pending before this Congress. As I have said before, I urge my colleagues in both the House and the Senate to support the very crucial goal of obtaining a constitutional guarantee of an equality of rights.

Existing laws fall far short of ensuring women equal rights in our society. The fact that women, who now make up 42.4% of this country's workforce, only make 59¢ for every $1 a man earns is cause enough for change. But more intrinsically, it is our longstanding belief in America that quality of opportunity is the foundation of our Constitution and Declaration of Independence.

This Administration has given lip service to a statute-by-statute approach to ensuring equal rights for women. Such an approach is grossly inadequate. Even more telling is the fact that this Administration's inaction in this arena speaks louder than it public declarations.

The Equal Rights Amendment is essential if we are to establish a coherent national standard for the elimination of discrimination based upon sex. Today's focus on education at this hearing will be further evidence that the ERA will fulfill the true meaning of democracy and equal opportunity.

Senator DECONCINI. Mr. Chairman, I want the record to show that I, as one cosponsor of the equal rights amendment, appreciate the time that you have put in and your willingness to examine both sides of this issue, in the detailed fashion that you have done. This hearing and other hearings that are coming up are occurring because of your sense of fairness, and I appreciate that, even though we may disagree on the actual issues.

Mr. Chairman, I also am going to attend the briefing on the incident with the Korean Airlines plane and the Soviet Union. I wonder if it might not be wise to recess this hearing for an hour so that the chairman could also attend, unless he has other plans. I hate to put these witnesses to that inconvenience, but I feel that it is paramount that we have this briefing. I am going to have to excuse myself if the hearing continues.

Senator HATCH. I would be happy to accommodate our ranking minority member. My only problem is that I have got to be at a meeting at about 11:45, and if I do not continue, we will not be able to complete these hearings. I will try and finish this up. Let me just ask a couple more questions.

Dr. Shalala, Professor Rabkin asserts that the ERA would not only make single-sex colleges ineligible for tax exemptions, but also other religious institutions as well which adopt policies that distinguish between men and women. Do you agree with his assertion in this case?

Dr. SHALALA. Yes, as long as they are educational institutions. I think we just answered that.

Senator HATCH. Under the ERA, would it be constitutional for Federal or State laws to allow charitable tax deductions to be taken for private contributions to single-sex private educational institutions?

Dr. SHALALA. I guess the answer is "No," Senator.

Senator HATCH. Do you agree, Professor Rabkin?

Professor RABKIN. Yes.

Senator HATCH. You both agree on both of those points.

Professor Rabkin, apart from Catholic educational institutions, are there any other religious educational institutions which practice policies relating to the sexes which may not pass constitutional muster under the equal rights amendment?

Professor **Rabkin**. I should think a lot of them, but I do not claim to be an expert on religious sociology or the religious practices of lots of diverse groups.

I know there are a lot of fundamentalist churches which have set up Bible schools, and that they have some fairly traditional ideas about when it is proper to have mixture between the sexes and when it is not, and I think probably a lot of their schools would be disqualified from tax exemption if they continued their traditional pattern, which they understand to be religiously required. Similarly, there are at least some Orthodox Jewish schools which think you ought to maintain very strict separation between the sexes, not merely in religious services, but in all kinds of situations. I suppose they would be in some jeopardy, too.

Senator **Hatch**. Do you agree, Dr. Shalala?

Dr. **Shalala**. I agree, but I would make Mr. Rabkin's point, and that is, of course these institutions could continue to exist as long as they did not require public funds or tax exemptions or some public activities, or did not want it.

Professor **Rabkin**. Yes; I think that means, again, as long as they are willing to be pariahs, sort of outcases, which are branded as contrary to public policy and therefore cannot have any even indirect, remote contact with public policy. Financially, it might be possible for them to continue, and it might not be, but it is putting a very heavy burden on them.

Dr. **Shalala**. While I agree it is putting a burden on them, I do not want to associate myself with the word "pariah" for institutions in this country that intend to be primarily or completely private and do not wish to participate in Government programs or get Government aid of any kind. I think it is their privilege under our Constitution, and they ought to be able to do that if they want to.

Professor **Rabkin**. But we are talking about institutions which would like to participate. They would like actually to get textbooks through a State program. They would like to be part of a library-lending system. They would like various other sorts of Government benefits. And they are being denied them. They are being told: "You absolutely may not participate because you are not clean enough."

Dr. **Shalala**. No; they are being denied them because they discriminate on the basis of race or sex, in the case if the ERA passes, because those are national policies that we consider so overriding that the Government ought not to provide funding in any way if an institution chooses to——

Senator **Hatch**. As a differentiation based on sex.

Dr. **Shalala**. Absolutely.

Senator **Hatch**. I see. Now, under the equal rights amendment, Dr. Shalala, would it be permissible for the Government to provide textbooks or other educational supplies to private schools of a single-sex character?

Dr. **Shalala**. No; textbooks, conceptually, are in my judgment no different than guaranteed student loans, tax exemption, any kind of aid. Subsidies are subsidies.

Senator **Hatch**. Do you agree with that, Professor Rabkin?

Professor **Rabkin**. Yes.

Senator HATCH. Under the equal rights amendment, Dr. Shalala, would it be permissible for the Government to provide scholarship assistance or any other form of educational loan assistance to a student attending a single-sex educational institution?

Dr. SHALALA. Only with the exception that I provided in terms of women's colleges that could demonstrate affirmative action or eliminating past discrimination.

Senator HATCH. But that would be the only exception?

Dr. SHALALA. That would be the only one.

Senator HATCH. Do you agree with that, Dr. Rabkin?

Professor RABKIN. Well, again, I do not agree with the exception.

Senator HATCH. You think there are no exceptions.

Professor RABKIN. I think there would be no exceptions.

Senator HATCH. But Dr. Shalala agrees with you, except for that one exception: women's colleges practicing some sort of affirmative action principle.

Let me ask you this, Dr. Rabkin. You make the point that under the equal rights amendment, it would not be merely the admission policies of private schools which might be subject to review or scrutiny, but a wide variety of policies unrelated to admissions, as occurred in the *Bob Jones University* case.

Professor RABKIN. Yes.

Senator HATCH. Could you elaborate on this point?

Professor RABKIN. Well, I will just repeat that in the *Bob Jones* case, they were denied tax exemption for a fairly incidental aspect of their program. It was quite offensive—I think almost everyone in the country considers it to be highly offensive to maintain this kind of ban on interracial dating, but it was hardly a fundamental aspect of their program. And I have been told by people who know something about Bob Jones that it is extremely incidental, because as it happens, they have virtually a ban on any kind of dating.

Now, if you just think about possible analogies, it seems to me that some very peripheral aspect of a school's program could be considered sex discrimination. Let me give you an example. The Education Department, previously, the Department of Health, Education, and Welfare, considered that dress codes could be instances of sex discrimination if they required—and this will sound like mockery, but it is not; I really am reporting this faithfully—if they required women to wear dresses, but not men; if they required men to wear ties, but not women. Well, I can imagine lots of schools which think, "Yes, let us have a certain dress code. Let us maintain a certain sense of decorum here." It may be rather oldfashioned, but again, it seems that that is a fairly peripheral aspect of a school's program. It might in every other respect make no distinction between men and women, but it has this dress code which does, and it seems to me, after the *Bob Jones* case, the likely result is that that school will have to forfeit its tax exemption, and will have to forfeit any other kind of indirect subsidy.

You are potentially talking about very far-reaching regulation of the way private schools operate. Every Catholic elementary school, for example, seems to maintain a discriminatory dress code—skirts for girls, you know, and not for boys—and they all would therefore be affected by the ERA.

Senator **Hatch**. The California Commission on ERA had this to say: "If the absolute approach advocated in the Yale article"—that is the Emerson article, I take it—"were applied to the ERA by the Supreme Court, hair lengths could not be regulated in only one sex in the public schools."

Do you both agree with that statement?

Dr. **Shalala**. I think that the ERA does say that both sexes have to be treated the same, that one could not do one thing for one sex and another thing for another.

Senator **Hatch**. So, hair length could not be regulated, unless it was regulated as to both sexes.

Dr. Rabkin, at our opening day of hearings, Professor Berns argued that Wellesley College would be in the same legal and constitutional position under the ERA as Bob Jones University under present law. Now, would you disagree with his statement on that?

Professor **Rabkin**. Oh, on the contrary. I most emphatically agree. That is my main point.

Senator **Hatch**. Do you agree, Dr. Shalala?

Dr. **Shalala**. No.

Senator **Hatch**. You do not agree on that. How would you distinguish that in this case?

Dr. **Shalala**. Would you repeat the question, Senator?

Senator **Hatch**. The question was a recitation of what Prof. Walter Berns said on the opening day of hearings on the ERA. He argued that in effect, Wellesley College would be in the same legal and constitutional position under the ERA as Bob Jones University.

Dr. **Shalala**. Senator, as I indicated, I believe that there would be an exception for single-sex female institutions——

Senator **Hatch**. But only that one exception.

Dr. **Shalala**. Yes.

Senator **Hatch**. And you think Wellesley would fit within that exception?

Dr. **Shalala**. As far as I know, Wellesley allows interracial dating, intersex dating, and all of those things—the last time I was there.

Senator **Hatch**. But it does not allow men into the university.

Dr. **Shalala**. No; it does not, though it does have some cooperative programs which allow men.

Senator **Hatch**. And I might add, it receives public assistance, too.

Dr. **Shalala**. Yes.

Senator **Hatch**. So, it does not allow men in, it receives public assistance?

Dr. **Shalala**. That is correct.

Senator **Hatch**. Why wouldn't Dr. Berns' statement be correct, then?

Dr. **Shalala**. Because, as I have indicated, if Wellesley demonstrated—and this would be closely scrutinized—that it had a program at that institution to eliminate past discrimination, I believe that that would be an exception.

Senator **Hatch**. Just a program, and that would allow it to——

Dr. **Shalala**. No; in the use of the term "program," I am talking about the entire institution.

Senator **Hatch**. The overall program of the institution is designed to overcome evidence of past discrimination.

Dr. **Shalala**. Yes.

Senator **Hatch**. Then Wellesley would be able to continue as an all womens college.

Dr. **Shalala**. For a period of time in which they continued those goals.

Senator **Hatch**. And once those goals were accomplished, then Wellesley would have to become a coeducational institution.

Dr. **Shalala**. Yes.

Senator **Hatch**. As well as all other women's institutions in the same category.

Dr. **Shalala**. Yes.

Senator **Hatch**. Dr. Rabkin.

Professor **Rabkin**. I have said before I think that is fanciful, and I want to elaborate on why this seems to me a very unreliable sort of argument.

Dr. Shalala says, "Well, this will be permitted, but only with close scrutiny, and it will only be permitted as long as it is necessary."

Senator **Hatch**. And only in girls' or women's schools.

Professor **Rabkin**. That is right, and only for women. Now, if you stop to think about this, what is going to be scrutinized? Wellesley says: "We think it is good for women to have a single-sex institution of the kind that we are, which is the good kind, and it is good for women." How can you scrutinize that? I mean, maybe it is good for women, maybe it is bad for women. I do not know. I just do not see what are the facts there, what is the relation there, what is the history there which could possibly be scrutinized. And in the same way, Dr. Shalala says: "Well, this will only be permitted as long as it is serving this purpose," because at some point, the courts will be able to turn around and say: "Sorry, Wellesley, your time is up. Now you have got to be co-ed." And it is very hard to understand how the courts are going to decide that: "Yes, this has been long enough, because now * * *." What? What exactly has been served? What exactly has been achieved? When will they know that? It seems to me fairly clear on the face of it that all that is being expressed here is an ideological sentiment, which incidentally, I do not disagree with—that is to say, I am perfectly happy with the claim that women's colleges are very good for women. Maybe they are. And maybe men's colleges are very good for men. Maybe they are. I do not know. But it just seems to me this kind of ideological claim is not something that can be scrutinized; it is not something which can be limited or measured, and therefore, it seems to me precisely the kind of thing which the ERA is going to outlaw.

Senator **Hatch**. Dr. Shalala, go ahead.

Dr. **Shalala**. You know, Senator, I guess my concern here is that we have spent so much of this hearing thus far, if I might complain to you a little, on 1 percent of the students in this country, those who are involved in religious seminaries or women's colleges.

Senator **Hatch**. I understand.

Dr. **Shalala**. Well, there are 125,000 women in single-sex female institutions. There are 3,000 institutions in this country. There are about 100 private single-sex men's institutions. We are talking about a relatively small portion of the total of the student population.

Senator **Hatch**. But they have their rights, too, don't they?

Dr. **Shalala**. Yes. There is no question in my mind. My concern is that the ERA has a much broader reach. I am very concerned as an educator about what is happening to girls who are not getting into science and math classes, about our need to come down very hard on voc ed in this country, which is sex-segregated——

Senator **Hatch**. We are all concerned about that. I deal with it every day as chairman of the Labor Committee and we are trying to make changes. Unfortunately we have not resolved them, but we are trying. But what we are dealing with here is the equal rights amendment as it applies to private institutions.

Go ahead, Professor Rabkin.

Professor **Rabkin**. I was just going to ask your indulgence to address that point just for a moment, the question of the areas of broader impact on nonprivate schools.

Senator **Hatch**. Surely.

Professor **Rabkin**. I did think that it was somewhat, well, misleading and illegitimate of Dr. Shalala, with respect, to cite all these instances of sex discrimination in schools in general, many of them public schools, because I do not think there is any evidence at all to indicate that where our current laws are failing, the ERA will suddenly do the job. I mean, if it is true—I am not sure that it is true, but if it is true—as Dr. Shalala claims, for example, that you cannot bring sex discrimination suits in employment against universities because judges do not really want to second-guess university hiring decisions, I do not see why she thinks that suddenly, if we have the ERA, judges will want to second-guess university hiring decisions.

If it is true that sex discrimination laws which are now on the books are not being vigorously enforced by the Justice Department or whoever else, I do not see why the existence of the ERA in itself will force the Justice Department to be more vigorous, or will force courts to be more sympathetic or will force litigants to be more active. And I would just point out that you have exactly this situation in regard to race discrimination, and civil rights leaders are constantly condemning the Reagan administration for not being vigorous enough. They are condemning the Supreme Court for not being staunch enough. And it does not help that there are direct constitutional provisions against race discrimination. So the fact alone that you put something in the Constitution is not going to solve a continuing problem for you, if it is a problem. I mean, it is not going to supply good law enforcement just by itself.

Dr. **Shalala**. Senator, my point is that title IX has already had an impact. I think there is a measurable impact of existing civil rights laws as they affect sex segregation in this country. Whether you are talking about title IX or the Equal Employment Act, we know and we can measure the impact that these statutes have had.

The fact is that it depends on who is in power as to how rigorously they are enforced. And we are in a situation now in this country in which the administration wants to, for all practical purposes, scuttle title IX, when we know that that statute has been somewhat effective in a whole set of areas.

If I complain that it has not been rigorous enough, it is a complaint that I expected it to reach much further. The reason that we want the constitutional amendment is clearly because of our experience with these statutes, that a broadbased constitutional amendment that is firmly placed in the Constitution will give us the strongest kind of backing for the kinds of progress that we think ought to take place in this country.

In our experience with State ERA's, most recently, in the Philadelphia case, where we were not successful under Federal laws to allow young women to go into the best high school in the city of Philadelphia, the State ERA was helpful in that case.

The hints that we have had from our experience with State ERA's and the successes that we have had with statutory law, uneven as its administration has been, have led us to believe that a stronger constitutional amendment is precisely what we need to get the kind of progress that all of us want in this country.

Senator HATCH. Dr. Shalala, Professor Rabkin argues in his statement that under the equal rights amendment, private single-sex schools would be denied a variety of opportunities to use public facilities. He mentions, for example, the use of public parks for specified periods of time, the use of public auditoriums for graduation, the use of public chambers for student concerts, and so forth. Do you agree or disagree?

Dr. SHALALA. They could rent them? If you are questioning——

Senator HATCH. He talks about using these public facilities——

Dr. SHALALA. Free?

Senator HATCH. Yes.

Dr. SHALALA. I guess I do not know the answer to that.

Senator HATCH. All of which occurs today.

Dr. SHALALA. Yes. If we were strict about it, I suppose that the concept of public aid, the use of facilities, could be carried that far. Whether the courts—if someone decided to take you to court—would consider that significant enough to bother about it, I do not know; but yes, public facilities are like tax-exempt status, and like guaranteed student loans, and any other public assistance.

Senator HATCH. Dr. Shalala, you said if we are strict about these matters that private single-sex schools would be denied the use of public facilities. If that is so, would the ERA require us to be strict about these matters?

Dr. SHALALA. To the extent that the Constitution requires us to be strict about everything that it touches, of course it does.

Senator HATCH. OK.

Dr. SHALALA. Whether one expects it to be implemented at that level of fine-tuning, I simply do not know.

Senator HATCH. The U.S. Commission on Civil Rights has claimed that under the Equal Rights Amendment, social fraternities and sororities which exist at many public colleges would have to be transformed into coeducational "social societies," or something of the sort. Do you agree with the Civil Rights Commission on this point?

Dr. SHALALA. It depends upon whether the fraternities are receiving public aid of any kind or whether a single-sex organization is so integrated into the academic life of an institution that it discriminates against another sex.

In the case of the Iron Arrow Honor Society at the University of Miami, if I remember correctly, the court held that the single-sex male honor society was so integrated into the academic life of the institution and so important to the futures of those young people that it, in fact, did discriminate.

Fraternities and sororities could continue to exist as separate entities as long as they did not receive aid.

Senator HATCH. In other words, as long as they do not participate in the university that receives aid.

Dr. SHALALA. Well, no, it is not a question of participating in the university; as long as they were not an integrated part of the academic life of the institution.

Senator HATCH. Dr. Rabkin, do you agree?

Professor RABKIN. I disagree with that. I think any sorority or fraternity that, for example, operated in a university building, was given office space somewhere, any kind of benefit or privilege——

Senator HATCH. Utilizes university facilities?

Professor RABKIN. Yes, as a fraternity. I mean, I do not think it would go so far as to say you can be a fraternity as long as none of your members attend the university and use the school library. But as a fraternity, if you get some kind of benefit through the building or whatever from the university, I think the likelihood is that the ERA would say that the sponsoring institution has either to cut its ties with that fraternity, or it has got to cut its ties with Federal and State governments, because that is essentially the way we have dealt with race discrimination by fraternities and sororities. It is not tolerated at all in fraternities or sororities which have any kind of connection with a university campus.

Dr. SHALALA. I do not think we are saying that much that is that different. We are saying that if they were supported with public funds or they were integrated into the academic life of those institutions, they would not be allowed.

Professor RABKIN. Yes. I mean, the difference is whether you—I do not think, actually, there is a significant difference, but that it does seem to me important how you state this. At some level of abstraction, it sounds as if, "Oh, well, denying them public funds is just telling them to act on their own."

When you get right down to the nitty-gritty of what we are talking about, I do not think "hounded" is too strong a word. We really have hounded institutions that have any taint of race discrimination, and we really want to penalize them, we really want to exclude them, we really want to make sure there is not a trace of it on campuses that are benefiting in any indirect, remote way. And that is, I think, what you are talking about if you have the ERA.

Senator HATCH. The original question involved citing the Civil Rights Commission, which suggested that college fraternity and sorority chapters would have to be replaced under the ERA by "social societies." Do you agree or disagree with that?

Dr. SHALALA. They would not have to be replaced by anything. I can see in no way the ERA would tell an institution that they had to create coeducational fraternities and sororities.

Professor RABKIN. No. They just would have to cut all of their ties with fraternities and sororities.

Senator **Hatch**. What if they have them—they have fraternities and sororities that are single-sex fraternities and sororities.

Dr. **Shalala**. If they get public aid——

Senator **Hatch**. Then they would have to cut that out.

Dr. **Shalala** [continuing]. They would have to cut that out. Or, if they are so integrated into the academic life of the institution——

Professor **Rabkin**. That is what I am disputing. That, I think is wrong. Dr. Shalala is saying fraternities will only be in trouble if they are extensively integrated into the academic life, and that, I think, is just incorrect.

Dr. **Shalala**. No. I said that if they also got support, public support.

Professor **Rabkin**. No. It does not matter whether the fraternity itself gets the aid. It matters whether the institution gets the aid.

Senator **Hatch**. This is extremely interesting to me. You wanted to say something, Dr. Shalala.

Dr. **Shalala**. No, that is all right. I think we have had enough of fraternities and sororities.

Senator **Hatch**. What if the fraternity or sorority was housed in a school dormitory? Is that sufficient?

Professor **Rabkin**. Yes. Again, the way it works——

Senator **Hatch**. These are important questions.

Dr. **Shalala**. I understand that.

Professor **Rabkin**. Yes. The way the law now works, if my own university, Cornell University, gets money from the Federal Government, Cornell University has various fraternities, some of which are in buildings that Cornell owns and rents to the fraternity. The fact that the fraternity itself does not get Federal money is irrelevant. The fact that Cornell itself is giving only a very incidental benefit to the fraternity is irrelevant. If Cornell gets Federal money, it cannot have a fraternity which practices race discrimination, and in exactly the same way it seems to me, you are going to say a school which gets any kind of Government assistance cannot give any kind of indirect support to a fraternity.

Senator **Hatch**. And you agree with that?

Dr. **Shalala**. I agree with that.

Senator **Hatch**. So in essence, you agree with the Civil Rights Commission?

Dr. **Shalala**. Yes, we just oppose it differently.

Professor **Rabkin**. Yes, but the previous——

Senator **Hatch**. Let her answer first, and then we will come back. I know this is a good interchange, and I want to hear both of you, but go ahead, Dr. Shalala.

Dr. **Shalala**. The ERA would not prohibit the existence of fraternities as purely private entities even at public institutions, unless they themselves were supported with public funds, or they were so integrated into the academic life of the institution.

Senator **Hatch**. Or they had any connection with public funds.

Dr. **Shalala**. Well, if they are using the facility of an institution——

Senator **Hatch**. Or if they live in a dormitory or use the facilities.

Dr. **Shalala**. That is right.

Senator **Hatch**. In other words, they would have to be completely outside the institution.

Dr. **Shalala**. It is the private club situation.

Senator **Hatch**. So they would not be college fraternities or sororities. They would have to be a completely private club or organization.

Dr. **Shalala**. That is right. They could call them fraternities—they could call them anything they want, Senator, as long as they are purely private.

Senator **Hatch**. You both basically agree, then.

Professor **Rabkin**. Yes. What are we talking about? In my university, for example, that would mean the existing fraternities would have to relocate several miles away, to get off of university land; they would have to get a hold of a lot of extra financing in order to have their own buildings. They would, in a lot of different ways, have to change the way they operate. It would be vastly more expensive for them to operate, and I think for a lot of them, that would mean they would cease to operate.

Senator **Hatch**. Dr. Rabkin, could you comment on the economic impact of the equal rights amendment upon private educational institutions? If you are correct, for example, that their tax-exempt status could be revoked if they did not admit sexes equally, how many of them would find it financially difficult to survive?

Professor **Rabkin**. I think a very large portion of them. I am not sure I can be more specific than that.

Senator **Hatch**. You indicated in your statement, as I recall, that the benefits from a tax-exempt status are estimated to be around 20 percent of the costs of the institution.

Professor **Rabkin**. Yes. And my understanding is that most private institutions—and for that matter, most public institutions—do not have a lot of fat.

Senator **Hatch**. In fact, all of them are having some difficulties today.

Professor **Rabkin**. That is right. They are all having difficulties as it is, and if you chop their financing by 20 percent, it seems to me you are forcing them to raise their tuitions quite a lot, and that is hard to do. As it is, it is very difficult for parents to find financing for private schools and I think a lot of them would just have to close their doors.

Senator **Hatch**. Now, Dr. Shalala, I do not understand some of the points that you made in your statement. You cite, for example, a listing of "subtle forms" of sex discrimination, including discriminatory counselors who believe that blue collar work is not appropriate for women, or certain areas of education are not appropriate for women. What, precisely, do you think ERA would do about these types of practices?

Dr. **Shalala**. I think it would have us review with our counselors the materials that we give out, what we say to young women and young men; to make sure that we are saying to young women, for example, the same thing we are saying to young men about health professions, to make sure that we are not channeling women into nursing and men into medicine. It would make us very careful and very conscious of the impact of counseling on career development and on career opportunities. And that has been an area that has been reviewed in research, both a review of the materials, as well as the impact of counseling.

Senator HATCH. Dr. Rabkin.

Professor RABKIN. There is currently in the title IX regulations a prohibition on discrimination in counseling, and I think Dr. Shalala's point is that this has not been adequately enforced. I think there is a very good reason why it has not been adequately enforced, and that is that the Government does not want to be second-guessing guidance counselors, breathing down their necks and saying, "Well, if you perhaps by your facial gesture indicate that you did not approve of this young women's career plan . . .," I mean, you do not really want to harrass schools in that way, and it is very hard to enforce something which is as vague as a requirement that you do not give different advice or different signals.

Now, I would just go back to my previous point, which is, if there is inadequate enforcement now, there is no reason at all to think that the ERA is suddenly going to ensure you adequate enforcement. It seems to me it is purely symbolic, and the reason, Senator, why I think it is very worthwhile to focus on yes, what are marginal institutions or unusual cases, is that it seems to me the effect on private schools, the effect on the unusual case, is the real effect that you are talking about. The kinds of things that Dr. Shalala talked about in her statement about public education and discrimination that already exists in most other institutions, those are just the kinds of things, it seems to me, that the ERA will not directly address. They are just the kinds of things that a constitutional amendment is not going to help because there are just intrinsic problems with law enforcement there.

Senator HATCH. You are saying those things are wrong, and we ought to be working to resolve them, but the ERA is not going to resolve them any better than title IX does today, is it?

Professor RABKIN. To be perfectly honest, I am not even sure how many of them are wrong. Well, I think——

Senator HATCH. Doesn't Dr. Shalala raise some legitimate concerns?

Professor RABKIN. Some of the things going on are wrong; some of them are not. I mean, there are just differences of opinion and differences of interpretation, and that is why it seems to me good to allow for diversity, so that different people can be in the schools that they are comfortable with.

I would just give one example. If you are talking about, let us say, a college setting, or even a high school setting, is it wrong to speak to students about the effects of pregnancy on different career plans; is it wrong to talk to them about the difficulties of having children if you go into this kind of job, where you are not allowed to take time off, or it is very difficult to take time off? Now, that seems to me a perfectly reasonable thing for women to be interested in, and it seems to me a perfectly reasonable thing for some kind of advisor to speak to them about. I mean, other people may be very offended by that. I would not consider that sex discrimination.

Senator HATCH. But you are not arguing with that, are you, Dr. Shalala?

Dr. **Shalala**. Yes, Senator, I am arguing against that. I think it is wrong to talk only to young women about the responsibilities that come with pregnancy. Everything we know about sex education in this country tells us that discussions of pregnancy and the implications of pregnancy and shared responsibilities for family ought to be discussed with young men and young women at the same time, and with equal fervor.

Senator **Hatch**. Well, we can certainly agree to disagree. That is all I can say.

Dr. **Shalala**. Senator, could I comment on Mr. Rabkin—I have a reputation for never getting angry, and I never do—but it does seem to me that the issue of counseling is a very serious issue and that it is not one to be dismissed lightly. We have now a generation of girls growing up in this country who have, for all practical purposes, been channeled outside of where the job opportunities are going to be in this country. They are given less opportunities for math training, in computer science; they are being advised to go into areas in which they are going to be locked into professions that may disappear in the next generation. And therefore, for many of us who want to make sure that there are equal opportunities for women, the whole issue of counseling is quite central.

Senator **Hatch**. I do not disagree with you on that, but I am saying I think Professor Rabkin's point is well-taken. Rather than have the Government come in under the ERA and police counselors. Perhaps it would be a better approach for us to educate counselors so that they treat women equitably.

Dr. **Shalala**. Senator, that is exactly what we intend to do.

Senator **Hatch**. Yes, but ERA is not going to ensure that.

Dr. **Shalala**. The advantage of having the ERA, which is broad-based, which will hit elementary schools and high schools and private and public colleges, is for the first time, we can raise, so to speak, the consciousness of educators in this country, so we completely review every area of subtle or overt discrimination, so that we understand that if we are going to affect young women's lives, they are going to be affected very early on in their educational experience, and unless we do something there, then you end up talking to me about what we need to do in women's colleges or in affirmative action programs.

All of our experience now in selective enforcement of various sex education laws is that we need as broad-based an approach to equal opportunity in this country, with special emphasis on women, if we are going to have an impact on women's lives that will give them equal opportunities with men. And that means we have to look at every area. In basketball language, it means that we need a full court press.

Senator **Hatch**. Dr. Rabkin, you seem to disagree.

Professor **Rabkin**. Yes, I disagree very much. I was saying before that if you have problems with law enforcement, the mere existence of a constitutional amendment does not eliminate those problems. I do not see how it even lessens those problems. And I say the same thing about the educational campaign Dr. Shalala is talking about.

If guidance counselors or educators generally have not heard about women's equality after 10 years of furious debate and a lot of publicity and a lot of effort on this, if they still have not heard of this, if it still has not penetrated to them, I do not know why she thinks that the ERA is suddenly going to turn them around.

It seems to me to the extent that people disagree with what the National Organization for Women or some other women's group thinks is the proper way to advise or the proper way to run a school, to the extent that people disagree, they disagree because they have serious differences, and I do not think there is anything so terrible about having a country in which different people have different opinions, and yes, in which they run institutions somewhat differently because of those opinions. It seems to me that if Dr. Shalala is really concerned about the effects on children, the people she should be reaching are the parents, and you should alert parents to the fact that different schools have somewhat different policies, and therefore, they should be careful about the kind of school they send their daughters to. It happens that there are a lot of parents who want their children to be raised in a way, or educated in a way, which Dr. Shalala does not agree with. I just do not see why that is so terrible. I just do not see why we cannot have room for some diversity in this country.

Dr. SHALALA. The problem, Mr. Rabkin, is there is not any diversity. Women are discriminated against in most educational programs in this country; in very large percentages, they are out of educational programs. I would like there to be an increase in diversity, which would be some recognition that we have had some success in some of these areas.

Professor RABKIN. But with all respect, I think it is preposterous to say that there is no diversity, and all institutions are uniformly hostile to women. I mean, that is just silly. There is quite a bit of variation as far as how different institutions deal with sexual differences, as well as differences on all kinds of other things. It really is, I think, just empty rhetoric to say there is not a wide range of choice. Surely, Hunter College is much better than Bob Jones University, from your point of view, on these things.

Senator HATCH. Let me move to another subject. You cite, Dr. Shalala, approvingly, the recent Pennsylvania State decision, in which the State ERA was used as a basis for eliminating all single-sex public schools. Now, do you believe that this would be the result under the equal rights amendment, as well?

Dr. SHALALA. Yes, with the exception that I noted.

Senator HATCH. With the only exception being any public all-women's school that is dedicated to affirmative action.

Dr. SHALALA. Right, and the religious exception for training for religious purposes.

Senator HATCH. I am talking about public schools, now.

Dr. SHALALA. Yes, yes, in public schools.

Senator HATCH. So you are saying that they would——

Dr. SHALALA. Yes, for public institutions, there would be an elimination of single-sex institutions. That case, of course, was very important in demonstrating that even though those young women went to the best so-called girls' schools, there were lesser opportunities in terms of science training and math training, which is another clear example of what I have been saying about the quality of education for women in this country.

Senator **Hatch**. Now, Dr. Shalala, you argue that the ERA would properly require closer judicial scrutiny of university hiring, promotions, and tenure procedures. Would you elaborate on that?

Dr. **Shalala**. Senator, I should have said early on, but it is probably quite obvious, that I am not a lawyer, so the use of these fancy terms is not my expertise.

Senator **Hatch**. That is OK. I understand.

Dr. **Shalala**. I would expect that we would have to lay out much more carefully, our procedures on tenure, promotion, and over a period of time, be prepared to justify those procedures as well as to put together firmer affirmative action plans when there were particular problems. The point is that with a consistent law that colleges and universities knew was not going to be scuttled periodically, I think that universities would be able to plan better in this area and would be clearer about their goals for tenure and the qualifications required for tenure and promotion.

Senator **Hatch**. Did you have a comment, Dr. Rabkin?

Professor **Rabkin**. Just two quick things. First, again, I do not see why having a constitutional amendment is going to give you better law enforcement than you already have. It is already illegal to discriminate against women in university hiring.

Now, second, if Dr. Shalala is for some reason correct about this—and I am really puzzled as to why this should be—but if it really does turn out to be true that, yes, judges will now scrutinize much more carefully these university hiring decisions, I would consider that to be a very damning charge against the ERA. It seems to me there is a very good reason why judges are reluctant to scrutinize these decisions too carefully, and that is because most academic decisions turn not on immediately apparent external criteria; they turn on rather delicate judgments of quality.

Senator **Hatch**. Subjective judgments?

Professor **Rabkin**. Of course, they are somewhat subjective. But certainly, they have to be highly trained. It is not enough to say, "This person published a book. That person published two books. Therefore, obviously, the second person should get the job or should get tenure." I mean, one book may be a really important work with a lot of original insights in it, and the two books by the other person may be very pedestrian and very shallow and not much of a contribution to scholarship. And I think it is very unrealistic to say that a judge is going to be able to evaluate that. He should read the works of these various academics who are competing for jobs and decide——

Senator **Hatch**. There is also the problem of all the underlying education needed to make that kind of value judgment. That is not necessarily how judges or lawyers are trained.

Professor **Rabkin**. Exactly right.

Dr. **Shalala**. Well, we would expect a judge to review the procedures, not necessarily all of the materials for an individual decision. The question that I was asked was whether there would be close scrutiny of the decisions, which I would expect there to be closer scrutiny of the decisions.

Let me say, though, on the fact that we have had these laws on the books, it seems to me, and I would like to repeat it, that the *Grove City* case gives us an example where there has been such unevenness in the messages that the national administration has sent to college and university presidents in this country about whether we are supposed to enforce the law or not to enforce the law. But one thing that a constitutional amendment will do is make it firm and long lasting. The decision to essentially destroy title IX on Grove City has sent a message across this country to institutions that they can wait and see and see what the courts end up doing.

Senator HATCH. Dr. Rabkin.

Professor RABKIN. I very, very strongly disagree. Dr. Shalala said earlier that there are various gaps in title IX; it does not have quite the full range of coverage that ERA would have. These are not gaps. They were deliberate decisions to set up the law one way, rather than another way. They are an expression of legislative judgment; they are an expression of concern to be flexible and to be reasonable—but, unfortunately, the ERA would not allow that kind of maneuvering room.

Now, the specific issue that she is talking about here is whether you should consider that an institution which does not receive direct Federal funding is still ultimately somehow a recipient of Federal aid, and all of its programs have got to be subject to this prohibition on sex discrimination.

Grove City just has some students who receive Federal loans. The institution itself does not receive direct Federal funding. Well, title IX has a so-called "pinpoint provision," which says that this applies only to the program receiving Federal aid, and it is very ambiguous what you mean by "program." And for some time, the Education Department has been contending that program means the entire institution. If anywhere in that institution, there is some indirect Federal money, that means the whole institution has got to, in every, single respect, comply with this antisex discrimination norm. Well, I think that is not at all an obvious, necessary, or correct interpretation of the statute, and what the Reagan administration has done is to say, "Now, wait a minute; is that a correct interpretation of the statute?" It has not even gone that far. In fact, what it has done is to say, having lost this case in lower courts, we are not now going in the Supreme Court to defend the Education Department's earlier claim that the whole institution is covered just because some students are receiving Federal loans. And it just seems to me, it is very unfair to characterize that as, "Oh, they are now sending a conflicting signal, they are turning the whole statute upside-down; they are eliminating enforcement." I do not think there is any question at all that institutions which directly receive Federal money into programs which are federally funded have got to eliminate all traces of sex discrimination in those programs. I do not think there is any ambiguity about that.

Dr. SHALALA. Let me point out that there did not seem to be any ambiguity for 10 years, through two different political parties and three administrations, and suddenly, 10 years later——

Professor RABKIN. That is absolutely wrong. There have been disputes——

Senator HATCH. There has been a real dispute on that.

Professor RABKIN. There has been a dispute about this from the beginning.

Senator HATCH. And it is a legitimate dispute.

There is a real question whether a school like Grove City, which does not practice discrimination and which receives no campus-based aid, should have to comply with all of the aspects of title IX. Now, that is a legitimate legal issue, in my opinion.

Professor **Rabkin**. Could I just point out that the interpretation of title IX that Dr. Shalala is contending for and is saying is obvious has been not just disputed, but it has been rejected by several Federal courts. Now, you either have to believe that there are a lot of Federal judges out there who are just completely bonkers and totally unreliable, or it seems to me you have got to accept that at least it is a plausible, legitimate, alternative view of the statute. I do not think it is terrible for the Reagan administration to agree with several Federal judges.

Senator **Hatch**. We are not debating title IX today, but there are going to be legitimate issues to resolve whether the ERA is enacted or not. And if the ERA becomes a part of the Constitution, there will be a a whole body of litigation under it. Everybody who has testified so far agrees with that. There will be all kinds of intricate, difficult questions, a number of which we have raised today.

But the purpose of this hearing, and the purpose of our other hearing, and the purpose of the future hearings will be to examine these matters to see what the constitutional implications are. We are not just going to march to slogans. We are going to find out just what does it mean. And I think both of you have given us the best shots you have on how you feel it will be interpreted, and I think it has been very helpful to this committee.

Let me ask this question. The California Commission on the ERA has also stated that the amendment should be interpreted to prohibit the administration of all private sex-restricted scholarships by State institutions. Dr. Shalala, do you agree with the commission on that matter?

Dr. **Shalala**. I think that is true.

Senator **Hatch**. You think it would.

Do you agree with that?

Professor **Rabkin**. Yes.

Senator **Hatch**. The California Commission on the ERA has also stated that the concept of "State action" developed under the 14th amendment will not necessarily apply to legal analysis under the ERA. Do you agree with the commission on that point?

Dr. **Shalala**. That is too legal a question for me.

Senator **Hatch**. How about you, Dr. Rabkin?

Professor **Rabkin**. Well, that is possible. My guess is that that is unlikely. The likeliest thing, I think, is that the courts will treat sex discrimination as being analagous to race discrimination and they will say that where race discrimination is forbidden by the Constitution, sex discrimination is forbidden.

Senator **Hatch**. I want to personally thank both of you for appearing here today. I think that this type of a hearing is a way of finding out the real meaning of the ERA. We are making a record so that people who are on both sides of this issue, as well as people who are undecided at this point, can at least have some record to look at to formulate their own conclusions on this matter.

I personally appreciate the efforts both of you have put forth here today and in the past. I think both of your statements are excellent. They will make a very significant part of our record. So I want to personally thank you again. I appreciate your being here.

Our next hearing will focus on the impact of the ERA upon the military. I hope we will have equally intelligent and articulate witnesses on both sides of that issue.

Thank you, and we will recess until that time.

[Whereupon, at 11:20 a.m., the subcommittee was adjourned.]

[The following was submitted for the record:]

MISCELLANEOUS MATERIAL

QUESTIONS FROM CHAIRMAN STROM THURMOND FOR PROFESSOR JEREMY RABKIN

1. Prof. Rabkin, in the recent case of Bob Jones University vs. United States, the United States Supreme Court, while couching its decision in language about charitable trusts, firmly based its opinion on the now well-established national policy against racial segregation. If the Equal Rights Amendment were to become a part of our Constitution, is it not logical to assume that the Supreme Court would eventually rule that private colleges and universities that are all-male or all-female are no longer to be extended tax-exempt status for federal tax purposes? There are only a handful of all-male colleges remaining but there are over 100 all women's institutions of higher learning. I believe you would agree that there is a great potential here for a devastating financial blow being struck to these institutions should financial contributions made to them by alumnae and friends no longer be deductible for income tax purposes. Can you predict how many such institutions might be forced to close because of financial restrictions brought on by the passage of the ERA?

2. Aside from the possible loss of contributions and gifts because such donations would no longer be deductions for the donor, is it not a real likelihood that colleges that restrict admissions to only one of the sexes and which refuse to change their admissions policies will lose Federal aid such as grants for research? Considering the dependence of some university research programs on Federal grants, might such an event seriously curtail a great deal of scientific research now being done at the university level?

3. Some public school districts continue to operate single-sex schools. The maintenance of such programs generally is for special purposes such as to house a program for the academically-gifted student. It can be assumed that State and local school authorities have a rational basis for the establishment and perpetuation of such single-sex

schools and have exercised their best judgment in doing so. Professor, if the E.R.A. were to become a part of the law of this land, could we hold out any real hope that local school officials could continue to exercise such discretion?

4. In the recently decided case of Arizona vs. Norris, the Supreme Court held that the practice of the companies paying retirement benefits to the employees of the State of Arizona were unlawfully discriminating against retired female employees by paying them a lower monthly benefit. This decision was based upon the 1964 Civil Rights Act providing for equal employment opportunities. This decision represents another instance where a practice of sex discrimination was identified and outlawed. Do you see any reason why this process of judicial identification and reversal will not continue in the area of sex discrimination? Is this process adequate in your opinion for the protection of women's rights? If not, why not? You will note here that this decision was based on existing law.

5. It is well established that physical education and participation in inter-scholastic athletics is an integral part of the mental and physical development of our youth. It has been speculated that the ratification of the Equal Rights Amendment would drastically alter our present system of inter-scholastic sports competition, that is, where all-boy and all-girl teams compete against like teams of the same sex. In light of what you have heard here today about sex discrimination in education, how do you see the passage of the E.R.A. affecting this system?

6. In Washington state, the Supreme Court there held that under that State's E.R.A. girls had a constitutional right to participate on a boy's high school football team. It has been conjectured that with the passage of a national equal rights amendment, participation on sports teams would be opened up to both sexes. For example, boys would become entitled to play on what had traditionally been the girl's

tennis team. If it true that most boys are better athletes than most girls, is it not possible that the result of such rulings could be the deterioration-and in some cases the elimination- of girls' sports competition as we presently know it?

7. Under existing law, namely Title IX of the 1972 Education Amendments, sex discrimination in the funding of college-level athletic programs is prohibited. Despite this fact, disparities in funding still exist and are well documented. Opponents of these amendments argue that this differentiation is justified by the fact that the mens' programs generate most of the athletic funds. Cases often cited are those involving the university football programs which generate tremendous revenues that are used to subsidize such programs as womens' field hockey. What impact would you foresee the passage of the E.R.A. as having upon these programs as far as funding is concerned?

8. Assuming that the passage of the Equal Rights Amendment mandated the opening of all sports teams to members of both sexes, what implications do you see for the personal privacy of the participants? If a boy elects to participate on the girls softball team, for example, does he thereby waive all rights to his privacy as far as dressing facilities is concerned?

RESPONSES OF PROFESSOR JEREMY RABKIN
to
QUESTIONS FROM SENATOR STROM THURMOND

1. For the reasons outlined in my prepared statement, I believe it is indeed most "logical to assume" that the Supreme Court would find single-sex institutions ineligible for tax-exempt status if the Equal Rights Amendment becomes part of the Constitution. I quite agree that this would likely strike a "devastating financial blow" at such institutions. It would indeed mean that contributions from alumni and friends would no longer be tax deductible. It would probably also require such institutions to pay income tax on interest and dividends and capital gains taxes on the sale of securities in their endowments - another "devastating blow" for institutions like Wellesley College that finance much of their activity from endowments. Finally, such institutions would probably be subject to local property taxes and state sales taxes. Under the combined weight of these blows, I doubt there are many institutions that could continue to operate.

2. Any institution declared ineligible for tax exempt status would surely be ineligible for federal grants, as well. But in truth I do not think this would seriously curtail a great deal of scientific research because there is not very much scientific research conducted at small colleges. Major research undertakings are found at universities with graduate programs and Title IX of the Education Amendments of 1972 already prohibits federal grant recipients from denying admission to graduate programs on the basis of sex. In regard to scientific research, then, I do not think E.R.A. would impose any significant changes in the status quo.

3. I cannot conceive how public school systems could continue to operate single-sex schools under the E.R.A. If the Amendment could allow this, it really would be entirely empty, it seems to me.

4. There are certainly areas not covered by existing laws, but in virtually every case that is because most people do not think it would be appropriate to prohibit sexual differentiation in such areas. Our continuing toleration of sexual distinctions in the military is one example.

Unless we are prepared to say that government or laws should never treat the sexes differently, the E.R.A. seems to me an unduly heavy-handed and rigid approach to the challenge of protecting women's rights. On the other hand, as the question suggests, the courts have not been at all reticent in asserting and enforcing women's rights where statutes do prohibit sex discrimination. Indeed, on a number of occasions the Supreme Court has rewritten state and federal laws to eliminate sexual distinctions under existing 14th Amendment doctrine.

5 & 6. This is a tricky issue. I think it is fairly clear that the E.R.A. would prohibit public institutions and institutions receiving public funds or tax exempt status - in other words, virtually every school - from maintaining teams or athletic programs that were officially organized on a single-sex basis. On the other hand, the amendment would probably allow "neutral" eligibility standards, based on relevant physical characteristics or capacities - height, weight, speed, etc. "Contact sports" may also be treated differently, for the implementing regulations for Title IX have recognized that considerations of privacy may justify single-sex competition in contact sports such as wrestling. Either way, I do not think we are likely to see women in Big Ten football, even if E.R.A. is added to the Constitution. Ironically, the greatest impact of the Amendment would probably be on women's teams, for many men are likely to meet the standards for "women's" teams, while my guess is this would be less common for women seeking to join "men's" teams. The likeliest result may be the destruction of women's athletic competition, as formerly "women's" teams came to be dominated by male players.

7. At present, the implementing regulations for Title IX sanction such disparities so long as there are equal expenditures on a per capita basis, in comparing men's and women's sports programs. This means that if there are many more men involved in sports programs than women, proportionately more can be spent on "men's" teams. As the question suggests, however, even this approach does not allow for the fact that "men's" teams tend to be much bigger money-makers - while, as big spectator sports, they may also require larger expenditures for equipment, facilities and so on. The Education Department's interpretation of Title IX has therefore been very controversial. So far as I am aware, it has not yet been endorsed by federal appellate courts and, in truth, it does not seem to have been very rigorously enforced by the Ed-

ucation Department. Under the E.R.A., however, I am not even sure that the compromise approach in the current Title IX regulations would be tolerated and certainly it is quite unlikely that any more flexible approach would be accepted.

8. Nothing infuriates proponents of the E.R.A. more than the suggestion that the amendment would eliminate separate toilets or separate dressing rooms for men and women. They have insisted from the beginning that the amendment has an implicit "privacy" exception to accomodate separate facilities in such circumstances. This claim has by now become so entwined with the "legislative history" of the amendment that it may indeed be accepted and respected by the courts. It is quite possible, perhaps even probable, then, that a boy on the "girls'" softball team would not have to waive all rights to his privacy as far as dressing facilities are concerned.

At the risk of provoking a bit more fury, however, I will add that I am not at all confident of this and I do not understand how the proponents of E.R.A. can be so confident of this. The proponents usually cite the Supreme Court's recognition of a "constitutional right to privacy," but this seems to me simply playing with words. The Supreme Court decisions associated with this "privacy right" - those dealing with abortion or birth control - have asserted that certain issues must be left to private decision: they involve "privacy" in the sense that the state or public authority is kept out, not persons of the opposite sex. Fourth Amendment "search and seizure" cases dealing with the "privacy" of the home seem equally unrelated. The awkward fact remains, on the other hand, that the courts would not hear of separate facilities for blacks and whites and E.R.A. proponents usually say the purpose of the Amendment is to make sex as much a "suspect" or illegitimate classification as race now is. If an exemption is made for dressing rooms in deference to contemporary moral standards, a qualification of very uncertian scope has been opened. In the 19th Century, moral standards were sometimes offended by women office workers and certainly would have been offended by women police or women construction workers. Today in many college dormitories men and women do share the same toilets and the same dressing rooms. If the E.R.A. is ratified, then, and the boy in your question is really concerned about his privacy, he might be better advised to think carefully before he joins that girls softball team.

RESPONSES OF PRESIDENT SHALALA
TO QUESTIONS OF SENATOR DeCONCINI

Question 1.

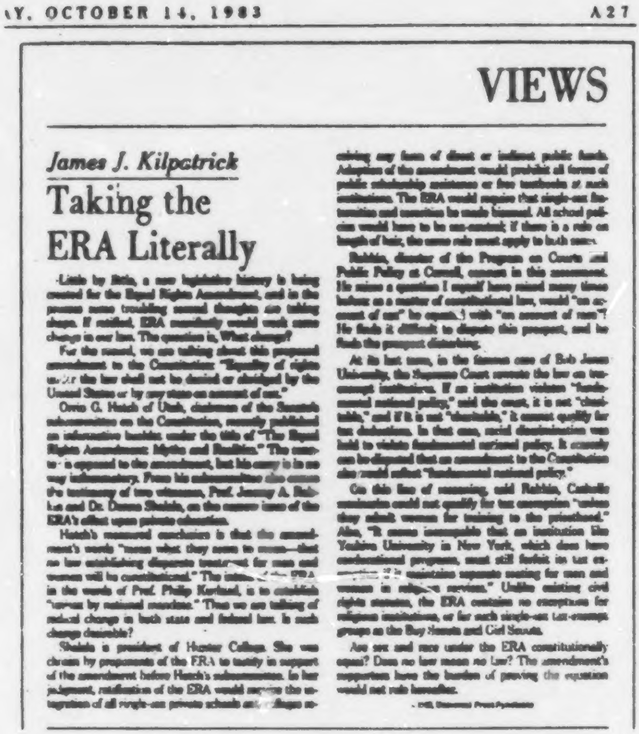
Regarding Title IX, President Shalala, could you comment on what the present Administration is doing to enforce the status and whether the existence of the ERA would affect these executive actions?

Question 2.

Can major civil rights legislation be made less effective without a change in the law simply by the way in which it is enforced?

The topic of the ERA hearings on September 13, 1983 before this Subcommittee was not, until the very opening of the hearings, focused on the very narrow subject of "the impact of the ERA in the area of private and parochial education." Hearing Transcript p. 4 (opening statement of Senator Hatch). Because the Equal Rights Amendment provides that "(e)quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex" (emphasis added), it is widely accepted by legal scholars that the ERA, like the Equal Protection Clause of the Fourteenth Amendment, governs only those actions or activities that constitute "state action." Constitutional provisions that govern "state action", including the Equal Protection Clause, do not ordinarily reach into the private sector. As a result, the Subcommittee Chairman's decision, stated for the first time on the day of the hearing, to focus the inquiry solely on the relationship of the ERA to private and parochial education, was an odd decision. This technical inquiry into the legal application of the ERA in the private sector is more appropriate for witnesses who are lawyers than for witnesses such as Mr. Rabkin, a political scientist, or for me, an educational administrator at a public institution and a political economist.

The result of the Chairman's decision was that the entire focus of the questioning by the Subcommittee was on the narrow private interests topic defined by Mr. Hatch. During the questioning, Mr. Rabkin made extreme claims that, among other things, the ERA will virtually eliminate parochial and private schools, and that the ERA will require the integration of seminaries and rabbinical schools. I believe that I answered clearly and simply his claims concerning seminaries and rabbinical schools with the explanation that the First Amendment would insulate such institutions. It is not necessary to elaborate upon that answer. Judging from inaccurate newspaper claims about my testimony, (see Kilpatrick, Taking the ERA Literally, Wash. Post, A24, October 15, 1983, and a "fact sheet" being circulated to the press by the Chairman purporting to summarize my testimony, attached), I believe it important to clarify why the ERA would not reach into the private sector in the manner and with the extreme consequences Mr. Rabkin has claimed that it will. In order to provide an accurate explanation, I have consulted my own counsel and she in turn has consulted with other attorneys and law professors knowledgeable in constitutional law including Professor Ann Freedman of Rutgers Law School and Professor Wendy Williams of Georgetown University Law Center.



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VIEWS

James J. Kilpatrick

Taking the ERA Literally

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The Doctrine of State Action

The Equal Rights Amendment would affect government action only. Private colleges, including single sex institutions, as purely private entities, would be exempt from the ERA. The determination of whether actions by an apparently private institution are really government action is based upon the facts of the government's relationship to the institution.[1]

There are three basic principles governing the determination whether state action is present for federal constitutional purposes. First, "'the mere fact that (an entity) is subject to state regulation does not by itself carry its action into that of the State for purposes of the Fourteenth Amendment.'" There must be "'a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.'"[2]

Second, the state

> can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State (citations omitted). Mere approval of or acquiescence in the initiative of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment (citations omitted). Third, the required nexus may be present if the private entity has exercised powers that are "traditionally the exclusive prerogative of the State."[3]

A recent decision of the United States Supreme Court makes it clear that ordinarily, under federal standards, a private educational institution will not be construed to be a state actor to bring it within the ambit of federal constitutional provisions in most circumstances. Last year in Rendell-Baker v. Kohn, 457 U.S. 830 (1982) the Supreme Court found that a teacher's firing by a private school was not state action under the Fourteenth Amendment and did not require constitutional due process of law, despite extensive government involvement in the funding and operation of the school.[4] Two other cases decided last year concerning other kinds of private institutions having significant state involvement make clear that, like private educational institutions, other private entities do not come within the scope of federal constitutional requirements even where there is significant government involvement.[5] These cases are consistent with the analysis applied in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), in which the court concluded that the grant of a state liquor license to a private club that excluded individuals on the basis of race was not sufficient state involvement to attribute the discriminatory conduct to the state and, thus, did not support a finding that the conduct was unconstitutional. From these cases taken together, my legal advisors conclude that, absent additional legislative or executive action, private institutions will rarely be subject to the requirements of the ERA just as private institutions are now rarely subject to the 14th Amendment requirements.

Tax Exempt Status and The ERA

The argument by ERA opponents that the ERA will require integration of private single sex schools and other institutions because it will require removal of their tax exempt status was not furthered, but in fact was put to rest, by the Supreme Court's decision in Bob Jones University v. United States, 76 L.Ed.2nd 159 (1983). The Bob Jones opinion was not based on the Constitution but on a federal statute.

In Bob Jones, the Supreme Court did not take up the reasoning of certain cases holding that under the Constitution the federal approval of an organization's receipt of tax deductible contributions or tax exempt status "call(s) forth a duty to ensure compliance with the Fifth Amendment."[6] Instead, the Court applied the analysis of a separate line of cases holding that a federal statute — the Internal Revenue Code — required the denial of tax exemptions to racially discriminating private schools. These cases reasoned that, in light of unambiguous national policy, the Internal Revenue Code "can no longer be construed so as to provide private schools operating on a racially discriminatory premise the support of exemptions and deductions which Federal tax law affords to charitable organizations and their sponsors."[7]

In short, the denial of tax exempt and tax deductible status at issue in Bob Jones was based, in the Court's decision, on provisions of sections 501(c) (3) and 170 of the Internal Revenue Code, 26 U.S.C. Section 501(c) (3), 170, and not the U.S. Constitution. The court held, based on explicit language in section 170, that

> (s)ection 501(c) (3) must be analyzed and construed within the framework of the Internal Revenue Code and against the background of the Congressional purposes. Such an examination reveals unmistakable evidence that, underlying all relevant parts of the code, is the intent that entitlement of tax exemption depends on meeting certain common law standards of charity — namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.

76 L.Ed.2d at 170. The Court went on — "(w)hen the Government grants or allows deductions...(t)he institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred." Id. at 173-174. To establish the clear and longstanding public policy against

racial discrimination in every area of life, the Court relied on the fact that all three branches of the federal government had taken clear action to eliminate racial segregation in education, and on the particular policy against racial segregation in education set forth in Brown v. Board of Education, 347 U.S. 483 (1954), and followed in a long line of subsequent cases.

These factors made clear that the racially discriminatory policies of Bob Jones University, and of Goldsboro Christian Schools, Inc., so offended public policy as to defeat any bona fide charitable purposes of those institutions. 76 L.Ed.2d at 174-76.[8]

In his oral testimony, Mr. Rabkin argued that Bob Jones would most certainly compel denial of tax exemption to private single-sex schools. In support of his view against this result, Mr. Rabkin belittled and characterized the discrimination in Bob Jones as de minimus and as not a "fundamental aspect of their program."[9]

I strongly disagree with Mr. Rabkin that the discrimination of Bob Jones was so unimportant to the university's program and to this country's public policy that it did not strongly and overwhelmingly offend public policy. The Bob Jones rule reads:

> There is to be no interracial dating
>
> 1. Students who are partners in an interracial
> marriage will be expelled.
> 2. Students who are members of or affiliated with
> any group or organization which holds as one of its goals
> or advocates interracial marriage will be expelled.
> 3. Students who date outside their own race will be expelled.
> 4. Students who espouse, promote, or encourage others to violate
> the University's dating rules and regulations will be expelled.

Bob Jones University v. United States, 76 L.Ed.2d 157, 167 (1983). As I interpret these rules, a student at Bob Jones could be expelled for arguing that the Supreme Court's decision overturning Virginia's antimiscegenation statute in Loving v. Virginia, 388 U.S. 1 (1967), was correct. How can this be incidental to the program of secular education? We are not addressing here the question "whether (such schools) should be forced to make themselves more inviting and attractive to blacks" as Mr. Rabkin so intensively suggested in his article "Behind the Tax-Exempt Schools Debate" in 67 The Public Interest 21, 23 (1982). Instead, Bob Jones has an express policy of punitive action against students for engaging in private activity that affects virtually every aspect of their lives and for expressing personal views about the exercise of citizens' rights of association under the constitution.

Private single sex schools face no danger of having the administrative branch automatically interpret the Internal Revenue Code to deny their tax exemption under the ERA or of having the legislative branch acquiesce in that determination, without a careful application of the standard adopted in Bob Jones.[10]

No branch of federal government — neither the courts, the IRS, other agencies of the executive branch nor Congress — would be required by the holding in Bob Jones to cut off the tax exempt status of a private single-sex school as a result of ratification of the ERA alone. Furthermore, according to the Supreme Court's reasoning in the Bob Jones opinion, there is no reason to fear that the IRS could act with impunity unilaterally to do so. The Court approved the IRS's implementation of its policy of denying tax exempt status to racially discriminatory private schools and found that the IRS had not exceeded its authority in enforcing the policy, on the grounds that the IRS's action was taken in the context of uniform action of the executive, legislative, and judicial branches to eradicate racial segregation and was not overriden by Congress on any one of numerous opportunities. Under Bob Jones, a similar examination would be required before the same policy were applied to sex discriminatory private schools.

Conclusion

In conclusion, the caselaw is clear that federal constitutional reach into the private sector is the exception, not the rule. The exceptions, when they occur, are extreme and compelling, and are made upon an appropriate showing by full and complete proof in a court of law. It is of the utmost importance, for any meaningful commitment to sex equality in this Congress, to permit the possibility of reaching such cases under the ERA in the same degree and under the same standard that is applied in cases involving race equality. It would be a major mistake of policy to exempt from scrutiny all private single-sex schools under any circumstances as some seek to accomplish by an amendment to the ERA.

[From Fortune Magazine, Oct. 31, 1983]

BY DANIEL SELIGMAN

Donna's Dilemma

■ What has gone before: Orrin Hatch of Utah keeps trying to find out what the Equal Rights Amendment means. His Senate Judiciary subcommittee hears testimony from Paul Tsongas of Massachusetts, a leading bleeder for ERA, but it turns out that Paul has no idea what laws and institutions would be affected by the amendment and gets sore at Orrin for asking. Hatch decides to hold more hearings and get witnesses who know which end is up. Subject of the first hearing in this new series: the effect of ERA on private education. Principal question on the table: could women-only colleges continue to receive the federal aid and tax exemptions needed for their survival if the ERA were in place? In the witness chair: Donna Shalala, president of Hunter College and an ERA partisan. Does the question get clearly answered? Are you kidding?

Consider Donna's dilemma. If she says that women-only colleges would have to go, she outrages some highly influential women—alumnae of Barnard, Wellesley, Smith, Mount Holyoke, etc., who firmly approve of such institutions while also tending to support ERA. But if she says that these colleges could coexist with ERA, then she has to explain how an amendment designed to end all sex-based discrimination could permit discrimination against men. Tough problem, eh?

Donna's attempted solution: Women's colleges could exist under ERA if they were there "for the purposes of eliminating past discrimination and for affirmative action."

Huh? This answer seems to have boggled the minds of all present. Hatch asked who would decide whether a particular women's college passed the affirmative-action test. Nonconfidence-inspiring answer: "I think the Court would end up making that determination." ERA fan Howard Metzenbaum of Ohio said the amendment couldn't possibly leave room for women's colleges.

In the next installment, we learn about the effect of ERA in the military, or maybe not.

ORRIN G. HATCH
UTAH

[illegible]
Telephone (202) 224-[illegible]

[illegible]
[illegible]

United States Senate
WASHINGTON, D.C. 20510

COMMITTEES
LABOR AND HUMAN
RESOURCES
JUDICIARY
SMALL BUSINESS
BUDGET
AGRICULTURE
OFFICE OF TECHNOLOGY
ASSESSMENT

September 23, 1983

Dear Colleague:

Several days ago, the Subcommittee on the Constitution conducted its second day of hearings on the proposed Equal Rights Amendment. The focus of this hearing was the impact of the ERA upon private and parochial education. During this hearing, a remarkable legislative history was created regarding the meaning of the Amendment in this area. I am taking the liberty of attaching a summary of this history as articulated by Dr. Donna Shalala, the President of Hunter College, and the individual selected by proponents of the ERA as best equipped to describe the meaning of the Amendment on the issue of the ERA and private/parochial education. I would be pleased to make the transcript of this hearing available to you or your staff members.

Sincerely,

Orrin

Orrin G. Hatch
United States Senate

OGH:sp

IMPACT OF THE ERA UPON PRIVATE AND PAROCHIAL EDUCATION

The following interpretation of the ERA was given by Dr. Donna Shalala, President of Hunter College, regarding its impact upon private and parochial education at a Senate hearing on September 13, 1983. Dr. Shalala was selected by ERA proponents as the person best equipped to represent the Amendment on this subject.

(1) Affirmative Action-- Despite language which apparently permits no exceptions regarding legal distinctions between the sexes, the ERA allows "affirmative action" programs for women.

(2) Private Schools-- The ERA requires the integration of all single-sex private schools and colleges receiving any form of direct or indirect public funds, including tax exemptions, except for those all-women institutions based upon principles of "affirmative action". (Shalala: "I do not know of any institution in the country in which there is not public involvement...")

(3) Scholarships-- The ERA prohibits all forms of public scholarship assistance to students attending single-sex private schools and colleges. It also prohibits the public provision of textbooks and other school supplies to students at such institutions.

(4) Public Facilities-- The ERA requires that the use of all public facilities, e.g. parks, auditoriums, be denied to single-sex private schools and colleges.

(5) Fraternities-- The ERA requires the integration of any fraternity or sorority associated with either a public college, or a private college receiving direct or indirect public funds.

(6) School Policies-- The ERA requires sex-neutral policies, not simply in the admissions process of public/private schools and colleges, but in each of its policies and facilities. For example, rules on hair length cannot distinguish between sexes.

(7) Religious Schools-- Under the theory established in recent Bob Jones University case, the ERA permits IRS to deny tax exemptions for religious-based schools which make distinctions between males and females in their admissions or other policies. Courts will balance 1st Amendment and ERA to determine whether such a denial is required.

(8) Bequests-- The ERA prohibits the administration of sex-restricted private scholarships by public institutions, or by private institutions receiving direct or indirect public funds.

(9) Public Schools-- The ERA requires the integration of all single-sex public schools and colleges.

[SUBCOMMITTEE ON THE CONSTITUTION]

RESPONSES OF PRESIDENT SHALALA

TO QUESTIONS OF SENATOR THURMOND

Question 1:

Dr. Shalala, over the years segregation has been a policy and practice of exclusion. I doubt that anyone would contest this statement insofar as it applies to separation of the races. However, it appears that most all-women's colleges were established for the specific purpose of promoting equality between the sexes in the area of education. These all-female institutions do a great deal to bring about equality for women by producing graduates who become scientists, educators, and political leaders. In this way, women's colleges enhance opportunities for women. If the Equal Rights Amendment were to become a part of our body of law, wouldn't those who have traditionally promoted equal opportunity for women through support of single-sex colleges be put in an untenable philosophical position?

The simple answer to your question is no, absolutely not; but let me elaborate. Private women's colleges, as I pointed out in my earlier reply respecting all private institutions, very well may not come within the sweep of the ERA because the ERA applies only to state action. So it may be that the affirmative action exception for private women's colleges will have no practical impact.

In the unlikely event that particular private colleges do come under ERA, it is important to look at the status of women's colleges in light of the history of women's education. Most private all-women's colleges were established in a time when women were excluded from education in male institutions. The policy and practice of exclusion of girls and women from education, like the policy and practice of racial exclusion, is long-standing and well documented.[11]

Private all-women's colleges were established with the specific purpose of providing women the education that they would otherwise be denied on account of their sex. Lack of resources for women's education made any "purpose of promoting equality between the sexes" a lofty ideal rather than a specific purpose.

Notwithstanding this lack of resources, women's institutions have made a great contribution to this country and to improving the status of women. Among other accomplishments, they have produced graduates who have become scientists, educators, and political leaders of great stature in proportions that far exceed what might be expected from their enrollments.[12] This may be true in part because such women are educated in an environment free from the well-documented detriments to female leadership in the classroom climate of coeducational institutions that is often hostile to female students.[13]

The touchstone of affirmative action is that the action be specially designed and serves to overcome the effects of historic discrimination and to provide opportunities and environments for learning not readily available elsewhere, and thus promote equality. This concept is inherent to the Equal Rights Amendment, not contrary to it. An all-women's institution that actually serves the purpose of providing education and training that truly advances women's role in society and that does not perpetuate traditional stereotypes,[14] is not in an untenable philosophical position in the context of the Equal Rights Amendment at all.

Until coeducational institutions offer women and girls the same educational opportunities and the same supportive environment for learning as are offered to men, the need will continue for institutions that are devoted to the education and advancement of women. Using objective measures, it can be determined when the goal of equal opportunity has been reached and affirmative action is no longer necessary.

Question 2:

> There are two ways that Congress can bring about greater equality in education for women in the field of education. One is through the enactment of specific statutes and the other is, supposedly, through the passage of the Equal Rights Amendment. Do you think that inequities in education for women can be adequately addressed through the enactment of specific pieces of legislation? If not, why not?

This question assumes that a constitutional amendment and specific pieces of legislation can be equally effective alternatives for creating law. This assumption is inaccurate because it ignores the primacy of the Constitution in defining the priorities of rights and protections concerning the relationship of the government to individuals. The Equal Rights Amendment and statutes are not equal alternatives to the same end. The ERA is needed to establish once and for all that discrimination on account of sex by any level or branch of government in any aspect of its dealings is no longer an option. No statute or collection of statutes can achieve that result.

As I noted in my written and oral testimony, this Administration's efforts to narrow the reach of Title IX only to those specific programs receiving federal funds, but not for programs benefiting from federal tuition aid, demonstrate dramatically how women's right to equality may be undermined by executive action.[15]

Despite the Supreme Court's holding that Title IX is modelled after Title VI see, Cannon v. University of Chicago, 441 U.S. 677 (1979), reversing 559 F.2d 1063 (7th Cir. 1976), several courts have cited the fact that racial discrimination is clearly proscribed by the Constitution while sex discrimination is not, in concluding that Title IX should not receive the same broad enforcement as Title VI, see, Hillsdale College v. Department of Health Education and Welfare, 696 F.2d 418, 429 (6th Cir. 1982).

Women need the important statement of principle that "equal rights shall not be denied on account of sex," unburdened by exceptions that typically appear in statutes. Girls and women for too long have had to stand by while boys and men continue to receive valuable training and experience in sex-segregated schools and programs preserved for the sake of tradition and the preservation of cherished stereotypes. A prime example is women's long exclusion, even under Title IX, from Philadelphia's prestigious all male Central High. This exclusion was only finally overcome last year under the Pennsylvania State Constitution's ERA and Equal Protection Clause and the Fourteenth Amendment of the U.S. Constitution when, in Newberg v. Board of Public Education, No. 5822, August Term 1982 (Court of Common Pleas, Phila. Co., Sept 28, 1983), the plaintiff proved that boys in Central receive three times the science, math, and gifted student training opportunities as the girls receive in the supposedly comparable Girls High. That case could not be brought under Title IX because of exceptions to this useful, but flawed, statute.

Even with the ERA, statutes will be needed. Statutes are the means of implementing the equality mandate of the Constitution in an orderly and thoughtful fashion and in a manner that is both efficient and cost-effective. Indeed, the two-year waiting period following ratification provides Congress and the States the time within which to consider and enact implementing changes in their statutes. It is in this supportive implementing role that statutes are the most useful.

Question 3:

Dr. Shalala, it has been concluded by some commentators that no law will ever make women equal — not even a "constitutional law." This conclusion is based upon the premise that making oneself equal is the responsibility of each individual. Supposedly, an individual can start the move toward full equality by developing a very real sense of self-worth as a person by acting in such a manner that he or she will be accepted as an equal by those around that individual as a matter of course. This theory ties in with your citation of the fact that of women enrolled in vocational training, only a very small percentage take courses that prepare them for the higher paid, typically male skilled jobs. Doesn't this situation stem more from the way women perceive themselves in society than from sex discrimination in vocational education?

The target of equal rights under law is not sameness. The opportunities for women to develop a sense of self-worth and to benefit themselves by means of drive and determination are still heavily burdened in all aspects of education and employment in ways that men never face. Women, because they are women, are frequently and consistently denied jobs or promotions or made the objects of unwanted sexual demands. Such treatment is always demeaning and demoralizing. But it is even more so where, as is often true with women because of discrimination past and present, one's options are extremely limited. Under these circumstances, to explain away the current status of women as due to the individual's failure to possess or develop a sense of self-worth ignores the persistent influence of the opinions of teachers, counsellors, neighbors and friends about the proper role of women in society. However confident and self assured an individual may be, no one makes it on her own, and everyone requires the support of others to succeed.

The situation for women is even worse in areas of non-traditional employment than in other areas. In non-traditional work situations, women not only face discrimination and harassment, they are also virtually excluded from social groupings in the workplace and from informal communication networks important to learning skills and finding better jobs, among other things. As reported in the attached article from The Stanford Observer (Stanford University, October 1983), some researchers have concluded that men want and affirmatively act to keep women out of such traditionally male jobs to protect their own status.

Every day women of great courage, individual self-possession, drive, and determination endure low-paying dead-end jobs to keep their families together and face demeaning sexual harassment and discrimination in the bargain. Those knowledgeable about the extent of discrimination against and harassment of women know that the problem is not essentially a lack of sense of self-worth on the part of women. Rather it is a denial of opportunity for women and the resulting perception on the woman's part that "if I rock the boat here, I may have no job at all."

The ERA will send an authoratative message to the entire country that women are entitled to the same aspirations, support, and training that men can take for granted.

Question 4:

Continuing with the subject of vocational training, I believe you stated that only 18% of women enrolled in such training were enrolled in trade and industrial programs. Is it not possible that the low percentage of participation in these areas which could lead to higher paying skilled jobs is due, at least in part, to differing physical characteristics between males and females? For instance, might not young women decide to avoid courses in boiler-making and brick masonry because of the heavy physical labor involved as opposed to your theory that they have been "steered" by guidance counselors away from these typically male occupations?

Again referring to the October 1983 Stanford Observer report of the problems women face in job segregation and exclusion from employment traditionally held by men, I would note that so-called differences in physical characteristics is not really the source of the low enrollments of women in trade and industrial vocational education programs. Of course, counselors do often counsel girls to stay away from jobs thought to be "too heavy", or so called dirty work, as not being "for girls." It is also true that even women possessing considerable physical strength have been flatly excluded from certain traditionally male jobs requiring such physical stength with the rationale that "a man is needed." Furthermore, even where strength was not actually required for job performance, jobs were defined as jobs for which "a man is needed." Sometimes, particularly following the enactment of Title VII, employers continue to exclude women from such jobs by imposing height and weight requirements or physical strength tests that far exceed any real requirements that have a demonstrated relationship to the jobs. In many instances these bogus requirements serve merely a proxy for the employer's preference for males in the job-selection process. We have seen this in employment of police and fire personnel, construction workers, coal miners, and in other occupations. Courts have concluded after long trials that many physical requirements have only a superficially plausible basis, and simply did not hold up under careful examination of what is actually necessary for safe and successful job peformance.

My goal in the area of trade and industrial vocational education and employment is to remove subjective cultural stereotypes from job training and employee selection and to replace these stereotypes with open and full opportunities for women and girls to choose freely from among the available occupations. While Title VII was a substantial step in the right direction, discriminatory training and education remain the sources of job segregation.

Question 5:

You stated that a "variety of forces" have kept women out of predominantly "male" jobs. Ostensibly, one of the main reasons for this is that many occupations are performed almost exclusively by men and this has the effect of deterring young women from attempting to move into these male-dominated fields. What are some of these "forces" that you speak of and how would the passage of the Equal Rights Amendment change this social phenomenon?

In answer to questions 4 and 5, I have described some of these factors.

Increasingly, behavioral scientists and scholars are studying and expanding documentation on the impact of these factors on women and girls that I will not recount here. The impact of the ERA on the social forces and structures that cause segregated economic opportunities would be similar to the impact of the Fourteenth Amendment upon opportunities and options for racial minorities to move into professions and occupations previously closed to them, following the landmark in interpretation of Brown v. the Board of Education. The people finally got the message that racial inequality is simply an unacceptable practice and violates the law of the land.

The Equal Rights Amendment would provide a firm final mandate for equality not subject to weakening amendments or repeal, in the same easy way as a statute would be. Furthermore, unlike Title VII that most, women included, perceive as being primarily a race statute, the ERA should be perceived by all as a clear mandate for equality on the basis of sex. Thus, I believe that we would no longer tolerate sex discrimination as we now do.

Question 6:

Dr. Shalala, in your statement you conclude that the discouragment that many young women receive which guides them into traditionally female positions of employment has a catastrophic effect on the incomes of women. You also state that this "discouragement" is sometimes overcome when, for example, a female student exhibits a intense desire to acquire a special skill that will lead her into a more traditional male occupation. Isn't this an admission that all that is needed for change in many of what you perceive to be sex discriminatory aspects of life is for women to set their goals high and go after what they seek with a great deal of drive and determination?

See answer to question 3.

Question 7:

It has been contended by proponents of the ERA that no statute will provide the bedrock protection of women's rights that will be provided by a constitutional amendment. This argument is based, at least in part, upon the belief that constitutionally protected rights are immune from changes in "policy." With the increasing emphasis on equality in such areas as education, employment, and athletics for women, do you foresee the likelihood that national policies promoting equal opportunities for women will become eroded or actually reversed?

See answer to question 4 and my written testimony.

Question 8:

Employment practices in institutions of higher learning have long been a subject highly protected by members of the academic community. Faculty members of colleges and universities have historically put forth the argument that their profession is unique and should be governed by a different set of standards. I am referring to policies governing hiring, promotions and the granting of tenure to faculty members. I believe that you stated that you do not advocate a judicial takeover of academic decision making but rather closer judicial scrutiny of academic procedures. If the ERA were eventually ratified and the standard of judicial review was an absolute one mandating that there be no distinctions between men and women, wouldn't the result be a total remodeling of academic employment as we know it today?

Achieving fairness may require that substantial changes be made in the process by which many academic employment decisions are made. Responsible scholars and bodies of lawyers to recomend that changes be made to incorporate greater fairness in academic decision making (See, Due Process in Decisions Regarding Tenure in Higher Education, Report of the Special Committee on Education and the Law, Bar Association of the City of New York 1984, unpublished at this date).

I do not foresee that the ratification of the Equal Rights Amendment would require the total remodeling to which the question refers. There are a number of voluntary measures that colleges and universities could take to demonstrate a commitment to granting equal rights to women, that could reduce the possibility of extensive judicial intervention.

In fact some changes have already been mandated. One federal court has ordered disclosure of traditionally confidential information to a rejected tenure condidate who presented a claim of discrimination under the Fourteenth Amendment, see Gray v. Board of Higher Education of the City of New York, 692 F2d 901 (1982). So academic institutions are already required to adjust some traditional policies to accomodate the demands of fairness and equality under the Constitution.

There are those, however, who continue to maintain that the academic selection process should remain entirely unexamined and that the chips should fall where they may. For tenured academicians, 90% of whom are still men, that philosophy has been self-serving. It is they, and others like them, who characterize any change as "a total remodeling." So far, the unexamined process has resulted in most academic departments recreating themselves in their own image. As a result, the chips have fallen hard on the heads of women and other underrepresented groups.

Question 9:

In your statement, you mentioned Winthrop College and The Citadel — two institutions of higher learning in my home state. You cite Winthrop as being all female; however, I feel sure that you are aware that Winthrop has in the last few years opened its admissions to men. In fact, Winthrop has a men's basketball team which participates in inter-collegiate athletics. The future of these fine institutions is of great concern to me. Could you tell me what you foresee as the future for these schools in the event that the ERA becomes part of our law?

I cannot imagine why the Citadel, as a prestigious engineering school should be closed to women. The stereotyped notion that women are not engineers and do not need that kind of education is part of the problem women have today. I hope, with or without the ERA the Citadel will open its doors to women.

In my view these results would enhance rather than diminish the quality and future of these institutions.

1. See, e.g., Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961). It is widely acknowledged that with Burton and since Burton, the cases have certainly articulated limits upon and, with the Burger Court, significantly cut back the reach of state action into the private sector. See K. Davidson, R. Ginsburg and H. Kay, Sex-Based Discrimination, 91-92 (1974); G. Gunther, Constitutional Law, 1007-28 (10th Ed. 1980) and 206-15 (Supp. 1982).

2. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 and 351 (1974).

3. Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982) citing Flagg Bros. Inc. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

4. At issue was the status of the New Perspectives School, a private secondary school in Brookline, Massachusetts for so-called problem children. Almost all of the students enrolled in the school were referred by the public school system, and state funds paid the tuition of all who were referred. Public funds accounted for 90% of the private school's operating budget for each of several years and 99% of the budget in one year. The state required the school to comply with detailed regulations ranging from recordkeeping to student-teacher ratios as a prerequisite for the referral of students from the public school system.

5. See Blum v. Yaretsky, 457 U.S. 991, 1002-12 (1982) (private nursing home receiving significant federal funds and subject to extensive regulation); Steelworkers v. Sadlowski, 457 U.S. 102 (1982) (private union election not within state action despite extensive regulation of unions and union elections). During the same Term, the Supreme Court did find action "under color of state law" where a private party engaged in joint action with a state official to accomplish a prejudgement deprivation of constitutionally protected property interest by application of a constitutionally defective state garnishment statute, and that a 42 U.S.C. S. 1983 claim against the private party was supportable. Lugar v. Edmondson Oil Co., U.S. 922 (1982).

6. McGlotten v. Connolly, 338 F.Supp. 488, 456 (D.W.C. 1972) (three judge court). See also Pitts v. Department of Revenue, 333 F.Supp. 662 (E.D.Wis. 1971) (three judge court); Falkenstein v. Department of Revenue, 350 F.Supp. 887 (D.Or. 1972) (three judge court) (grant of state tax exemption to organizations that discriminate on the basis of race in their membership violated the Fourteenth Amendment).

7. Green v. Connally, 330 F.Supp. 1150, 1164 (D.D.C.) (three judge court), aff'd mem. sub. nom. Coit v. Green, 404 U.S. 997 (1971). See 76 L. Ed. at 167.

8. Interestingly, it was this kind of result reached by a notable conservative Supreme Court that Mr. Rabkin has complained of as "models of irresponsible judicial activism." Rabkin, Behind the Tax-Exempt Schools Debate, 67 The Public Interest 21, 27 (1982). Even Mr. Rabkin, however, acknowledges that the question of denial of tax-exemption to racially discriminatory institutions grew up "when the public schools were forced to desegregate in the mid-1960's, at a time when private schools were being established throughout the state... as a means of circumventing public school integration." Id. at 26.

9. "Well, I just repeat that in the Bob Jones case, they were denied tax exemption for a fairly incidental aspect of their program. It was quite offensive... but it was hardly a fundamental aspect of their program. And I have been told by people who know something about Bob Jones that it is extremely incidental, because as it happens, they have virtually a ban on any kind of dating." Tr.p. 50 (Rabkin).

10. Title IX of The Educational Amendments of 1972 now exempts from its requirements admission practices of all single sex schools, except those of graduate, professional and vocational schools. This exemption does not protect single sex public schools from a finding of unconstitutionality under the Fourteenth Amendment, Mississippi University for Women v. Hogan, 103 S.Ct. 3331 (1982)' Neuberg v. Board of Public Education, No. 5822 August Term 1982 (Court of Common Pleas, Phila. Co., September 28, 1983) (Fourteenth Amendment, state equal protection and state ERA grounds).

11. See Jencks and Riesman, Feminism, Masculism and Co/Education, The Academic Revolution, 291-311 (1968).

12. See, Tidball, Women's Colleges and Women Achievers Revisited, Signs: Journal of Women in Culture and Society, 1980, Vol. 5, No. 3, for a comparison between acheivement among graduates of women's colleges and acheivement among graduates of other higher education institutions.

13. See, generally, Lockheed, The Modifications of Female Leadership Behavior in the Presence of Males (Educational Testing Service, Princeton, NJ, 1976); Berger, Conner and Fisch, Expectation States Theory, 113-242 (1974) (development and application of theory concerning the role of status characteristics in the development of expectations for self and others in performance situations).

14. Compare, Mississippi University for Women v. Hogan, 103 S.Ct. 3331 (1982) (perpetuating stereotypes).

15. The fact that this Administration pursues such a narrowing interpretation with respect to Title IX of the Education Act of 1982 while continuig to rely on a broad interpretation of Title IX's counterpart, Section 504 of the Rehabilitation Act, 29 U.S.C. Section 794, in the now much-publicized Baby Doe enforcement efforts by the Department of Justice, demonstrates that the basis for its action is hostility to women's rights and not a principle concern about federal encroachment.

October 1983 THE STANFORD OBSERVER

Job segregation still rampant

'Women get a ticket to ride after train leaves the station'

Despite the highly publicized achievements of Sally Ride and many other individual women, occupational segregation by sex is "no better today than it was in 1950—and probably no better than it was in 1900," according to Associate Prof. Myra Strober of the Stanford School of Education, director of the Center for Research on Women (CROW).

An economist who has found significant differences in the career progress of men and women MBA's, Strober believes occupational differences by sex should be considered in a cultural context.

Several recent Stanford studies indicate that the closer data are examined, the greater the true differences become.

"Women get a ticket to ride after the train has left the station" was the way Stanford students Susan and Michael Carter summarized their comparison of earnings differences by sex in several professions.

In medicine, for example, women MD's are more likely to work for a clinic than for themselves. In law, women work in the less lucrative specialties.

In dentistry, one of the few professions where practitioners are not being "deskilled" and where relative incomes are still rising, women comprise only three percent of the practitioners and four percent of the students.

By allowing dental hygienists to do more routine tasks, dentists have upgraded the work they perform as professionals. Hygienists, of course, are overwhelmingly women.

While women have become proportionately greater among computer programmers and systems analysts, the importance of this field may be diminishing. Surprisingly, the students found, between 1970 and 1977 women's incomes rose from 70 percent to 80 percent those of men while their share of these jobs rose from 20 percent to 26 percent.

Men's earnings increase less rapidly when a profession is "deskilled" and an oversupply of trained personnel develops.

"Men workers are very interested in protecting their territory," Strober observes. If more women enter a predominantly male field, they increase the labor supply. At some point, men may fear their jobs could become "women's work," with results not unlike those of "white flight" from neighborhoods fearing residential integration.

Subtle differences in communication style proved a powerful barrier to women enrolled in a welding course in a Seattle community college, Cecile Andrews found in Stanford doctoral dissertation study.

The class included 15 men and three women. While there was no overt sexual harrassement, the women were effectively ostracized, Strober said. No one spoke to them in class or in the college cafeteria. The women felt "unwanted."

In class, women asked simple direct questions—"what does this mean?" for example.

Men would take longer to ask questions, usually supplying a potential answer. The teacher would reply simple "yes" or "no," and "usually the men students were right," Strober said.

Where the women were starting with no knowledge of welding, the men used code words to suggest they knew the answers. This enabled the men to view the women as "dumb." By the end of the course, the women said they were not at all sure they wanted to become welders. They missed the chance to talk with friends in a "female" culture.

Other studies have reached similar conclusions, notably Cynthia Epstein's analysis of women lawyers and Judith Steihm's report on women at the U.S. Air Force Academy.

In a third Stanford study, Wanda Brewster O'Reilly interviewed 12 dual career couples on the interaction between family and corporate life.

While all the couples said they were interested in furthering both careers within the marriage, they behaved in ways which advanced the husband, Strober said.

"This makes economic sense, since in all the couples studied, the men earned more than the women."

Where married women in professional careers often say they see no conflict with their family roles, further questionning and analysis shows they have lowered their expectations.

Strober suggests several ways in which companies can work toward a more integrated work force:

1) Bring in more than a few token women, when possible. Some research suggests that men may feel more threatened when the number of women increases.

2) Enable women to create support groups across corporations as well as within their employer's firm. "Women in professional careers need other women to talk with," she notes.

Myra Strober

3) Provide more child care availability.

4) Consider adding a "wide" track to the "fast" track, an idea suggested by O'Reilly for those who recognize family commitments as well as those to the company.

The "superwoman" syndrome has become increasingly evident in business, law and several professions, where people are paid well but expected to work 60 to 80 hours a week, Strober observed.

In one bank with a very good policy on maternity leaves, talented women were not returned to their original position but often were promoted into positions of "extreme overload" soon after having a child.

Even when housework is shared, women are often responsible for picking up youngsters from child care or the doctors, she noted.

Between 1950 and 1980, she notes, the proportion of women with children under age six who are in the work force nearly quadrupled, from 12 to 45 percent. The proportion of women with children age 6 to 1. in the work force doubled, from 30 to 60 percent.

While women's experience in the work force increased and their "exit rate" declined sharply, the earnings gap in comparison with men has increased since 1955.

Among full time employees working year-round, white women's earnings fell from 65 to 59 percent of those of white men by 1980.

During the past 20 years, black women's earnings have moved up to nearly 95 percent of those of white women, as former domestic workers have moved into clerical, nursing and teaching jobs.

Between 1955 and 1980, there also has been a "marked improvement" in the earnings of black men compared to white men, with the ratio increasing from 60 percent to 75 percent.

But as recently as 1979, white men with only eight years formal education earned an average of $14,500, compared to only $13,000 for white women with a college degree.

While more than 200 different studies have examined possible reasons for this difference, only 40 percent can be attributed to such factors as differences in years of education, work experience, skills, and absentee rates. And some—including Strober—believe even this figure probably is high.

Whenever women have children, the impact on earnings is negative. But for men, having children tends to be positively correlated with earnings.

While the press highlights individuals moving across traditional occupational lines, statistics tell a different story, Strober notes.

Studies by June O'Neill of the Urban Institute show that the proportion of all employed women who worked in predominantly male occupations—defined as those with 60 percent or more men—rose from 9 percent in 1972 to 10 percent in 1978. The proportion of all employed men working in predominantly female occupations fell from 9 percent to 8 percent in the same period. Those working in "integrated" occupations (with no more than 60 percent of either sex) rose from 16 percent to 22 percent.

Detailed analysis often reveals greater segregation than aggregate data suggest, Strober observes. Where government statistics often lump crossing guards and bridge tenders together, for example, the first group is predominantly women, the second mainly men.

A National Academy of Sciences study by Heidi Hartman found that while 49 percent of all assmebler were women, in the auto industry the ratio was only 17 percent, while in electrical machinery it was 74 percent.

In a 1979 study of 400 business establishments, James Baron of the Stanford Graduate School of Business and William Bielby found that in half the firms examined, no men and women shared the same job title. The mean index of segregation by sex was .84 on a scale where 1.0 meant total segregation.

"The more carefully you look, the more segregation you find," Strober comments.

In a recent study of more than 3,000 students in 23 computer camps, Prof. Robert Hess of the Stanford School of Education found that about 75 percent of the students were boys, 25 percent girls. The proportion of boys was highest at the most expensive camps, suggesting parents were willing to spend more for them to acquire this skill.

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A LEGAL ANALYSIS OF THE POTENTIAL IMPACT OF THE PROPOSED EQUAL RIGHTS AMENDMENT (ERA) ON PRIVATE SINGLE SEX EDUCATIONAL INSTITUTIONS

Karen J. Lewis
Legislative Attorney
American Law Division
March 6, 1984

Executive Summary

This paper discusses the problem concerning the potential impact of the proposed ERA on private single sex educational institutions. Generally, the concerns that have arisen center around whether such entities would have to alter their admissions policies and other aspects of the educational program they offer students. In addition, two other issues have been raised which relate to tax policies: (1) whether the ERA would cause private single sex schools receiving no federal funds to lose their tax-exempt status (presuming, of course, that they enjoy such a benefit); and (2) whether the ERA would permit individual taxpayers, who contribute to these tax-exempt private single sex educational institutions, to continue to take tax deductions for their respective contributions. This paper begins by summarizing the various views expressed by people who have studied the subject.

The legal problem presented is actually quite complex. An analysis of it, however, does break down fairly conveniently into two parts: (1) whether "state action" is present, thus bringing the entity within the scope of the ERA and (2) whether taxpayer suits can be brought against the government to cause the government to halt any practice which may be involving it indirectly in encouraging the discriminatory practices of the nongovernmental educational institution, e.g. funding, tax exemptions, etc.

The legal effect of the ERA is confined to "state action", as in the case of the Fourteenth and Fifth Amendments. "State action" relates to the nature and degree of government involvement in certain activities, e.g. private activities. Our research and reading of the relevant cases in the area has led us to conclude that various forms of government aid, e.g. grants, tax exemptions, student assistance, would probably not be sufficient to clothe the private single sex school as a "state actor" for purposes of the Fourteenth Amendment. By analogy, the same conclusion would probably be true for the proposed ERA.

With respect to the other side of the problem, unrelated to the issue of "state action" but directly concerned with suits against the government to enjoin the government from continuing a policy that fosters discrimination, the issue is whether the state's activities violate constitutional standards of governmental conduct. The problem is basically one of whether the government should be permitted to continue to "encourage" the existence of a discriminatory practice. Some of our research indicates that it may be conceivable that should the ERA be ratified, privately sponsored schools which elect to adhere to a single sex policy may have to do so at the price of governmental support. There is some authority for the idea that the government would be prohibited from sustaining, through the private educational entity, discrimination which it could not practice directly. The result flowing from this principle is that such an institution's eligibility for government grants and subsidies, for tax-exempt status, and the advantage of receiving contributions tax-deductible to the donor would likely be lost. This conclusion can be derived from the *Norwood* v. *Harrison* line of cases.

However, the question of standing surrounds the situation where the government is the defendant and the plaintiff is a party, e.g. a taxpayer, trying to enjoin the government from assisting a private educational institution which is carrying out a discriminatory policy. Having "standing" to bring suit is critical to getting into court. The Supreme Court's rulings respecting the "standing" issue are not completely clear. There is a divergence in the Supreme Court's precedent with respect to the law of standing. On the one hand, there is the Court's 1976 ruling in *Simon* v. *Eastern Kentucky Welfare Rights Organization*. It suggests that litigation concerning tax liability is a matter between the taxpayer and IRS, and there is very little room left for third party challenges. This case established very stringent standing requirements as well as setting forth very difficult criteria for a plaintiff to satisfy in order to prove his or her case. The heavy burden imposed on a plaintiff as a result of this decision indicates that if the ERA should be ratified, it would probably be fairly difficult for an individual to successfully challenge the government so as to compel it to deprive private institutions, such as private single sex schools, from enjoying a tax-exempt status simply because they do not admit both sexes.

While *Eastern Kentucky Welfare Rights Organization* would make the success of suits against the government highly unlikely, there is another line of cases indicating that black citizens have standing to complain against government action alleged to give aid or comfort to private schools practicing race discrimination, *Green*, *Norwood*, and *Gilmore*.

Currently, pending before the Supreme Court is *Regan* v. *Wright*, which may be the case in which the Court clarifies the law of standing and the rights of third parties to sue the government. This case is the follow-up to the Court's decision in *Bob Jones University* and *Goldsboro* where the Court upheld the IRS policy of either denying or withdrawing the tax-exempt status of private educational institutions that discriminate on the basis of race, a practice contrary to our nation's fundamental public policy. The *Bob Jones University* and *Goldsboro* decisions can be distinguished from the question of the potential impact of the ERA on private single sex schools on the ground that these two cases involved race and not sex discrimination and represent a statutory and not a constitutional interpretation by the Court. Nevertheless, the pending *Regan* v. *Wright* case is important because it should shed light on the matter of how the government can be made to enforce nondiscrimination.

Another case pending before the Supreme Court which may provide insight into the problem of the potential impact of the proposed ERA on private single sex schools is *Gomez-Bethke* v. *U.S. Jaycees*. Here, if the Court reaches the constitutional question, we may have a clearer understanding of what the limits are on government regarding the prevention of nongovernmental discrimination.

This paper concludes that the proposed ERA would probably not make a private single sex school, which is tax exempt, susceptible to a state action challenge. There are court decisions supporting the position that tax-exempt status is insufficient government involvement to make the school a "state actor" subject to the Fourteenth Amendment. By analogy, the same would probably be true under the ERA. Furthermore, as the current state of the law indicates, there may be strong obstacles limiting the ability of a plaintiff to 1) establish standing to sue the government and 2) prove that "but for" the government's favorable tax treatment, the private institution would not be engaging in a discriminatory practice. Also, there are two pending cases before the Supreme Court this term which may provide greater clarity respecting not only how far the government can intrude on a private entity concerning enforcement of nondiscrimination principles, but also the law regarding standing to sue.

A LEGAL ANALYSIS OF THE POTENTIAL IMPACT OF THE PROPOSED EQUAL RIGHTS AMENDMENT (ERA) ON PRIVATE SINGLE SEX EDUCATIONAL INSTITUTIONS

Introduction

Throughout the ongoing debate over the ratification of the proposed Equal Rights Amendment (ERA), questions have arisen concerning the potential impact of the amendment on private single sex educational institutions. The issue has been expressed in various ways. Two specific queries include: (1) whether the ERA would cause private single sex colleges receiving no federal funds to lose their tax exempt status (presuming, of course, that they enjoy such a benefit); and (2) whether the ERA would permit individual taxpayers, who contribute to these tax exempt private single sex educational institutions, to continue to take tax deductions for their respective contributions.

The legal problem presented by this inquiry is quite complex. Both proponents and opponents of the ERA have expressed differing opinions concerning the matter. In discussing the question of whether the proposed ERA would have an impact on private single sex educational institutions, one must understand the nature of the arguments and the concerns advanced by proponents and opponents of the ERA. The purpose of this report is to analyze the status of private single sex schools in the context of the proposed ERA. By addressing the points that have been raised in the debate over the ERA regarding its effect on these private educational entities admitting only members of one sex, a legal discussion that is both thorough and balanced should emerge.

At the very outset, we discuss the arguments that have been made with respect to the ERA and private single sex schools. After this review of the opinions expressed by proponents and opponents of the ERA, there follows an examination of the language of the proposed amendment currently pending in the 98th Congress, H.J. Res. 1/S.J. Res. 10. This discussion involves an explanation of the state action doctrine, the significance of sex as a prohibited classification from a constitutional perspective, and the U.S. Supreme Court's interpretation of sex-based discrimination under the Fourteenth Amendment's equal protection clause. The primary focus is on the concept of state action since an understanding of the law with respect to it is critical to comprehending the application of the proposed ERA. The next portion of the report will apply current case law principles regarding state action and sex discrimination to the problem at issue: the potential impact of the proposed ERA on private single sex schools. This section of the paper will address the matter of whether the Supreme Court's decision in Bob Jones University v. U.S., 103 S. Ct. 2017 (1983), a case involving tax policy with respect to private schools and race discrimination, will be controlling in the sex discrimination context.

DISCUSSION OF THE VARYING VIEWS EXPRESSED CONCERNING THE IMPACT OF THE ERA ON PRIVATE SINGLE SEX EDUCATIONAL INSTITUTIONS

There is disagreement among individuals who have studied the question concerning precisely what the nature of the impact of the proposed Equal Rights Amendment (ERA) would be on private single sex schools. In this portion of the report, the differing opinions will be set out.

In 1973, one authority wrote an article concluding that the effect of the proposed ERA on single sex educational institutions would be two-fold: (1) If one were to analyze the problem from the standpoint of "state action," the proposed ERA would be unlikely to result in constitutionally mandated sexual integration in admissions to these institutions. The author concluded that various forms of government aid, e.g. grant, tax exemptions, student assistance and the like, would probably not be sufficient to clothe the private single-sex school as a "state actor" for the purposes of the Fourteenth Amendment. The analysis upon which this part of the conclusion was based was presented in the context of suits against the school designed to stop the discriminatory admissions policy. (2) After the ERA was ratified, privately sponsored colleges which elected to adhere to a single sex policy would do so at the price of governmental support. This second portion of the author's conclusion was reached after an analysis in which the author focused on actions against the government to stop it from providing further aid. In such suits, the same standards for finding "state action" would not apply, and the government could be enjoined from extending aid to a private school that discriminated under less rigorous standards than would apply if the suit were against the school itself. The author felt that there was substantial authority for the theory that government would be prohibited from sustaining, through the private college, discrimination which it could not practice directly. The result flowing from this principle would be that such an institution's eligibility for government grants and subsidies, for tax-exempt status and the advantage of receiving contributions tax-deductible to donor, would likely be lost.[1]

This author summed up her conclusions as follows:

> If the Equal Rights Amendment is adopted, the nation will have an articulated firm public policy against governmental support of discrimination based on sex. Public educational institutions will be required by the Amendment to abandon single-sex admission policies. Since privately sponsored colleges ordinarily remain sufficiently isolated from the state to avoid the characterization of their activities as "state action," the Amendment is unlikely to result in constitutionally mandated sexual integration in admissions to these institutions. However, the privately sponsored college which elects to adhere to a single-sex policy will do so at the price of governmental support...
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> 18 St. Louis University L.J. 41, at 74 (Fall, 1973).

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[1] Gallagher, Monica. "Desegregation: The Effect of the Proposed Equal Rights Amendment on Single-Sex Colleges," 18 St. Louis University L.J. 41 (Fall, 1973).

Approximately ten years after that St. Louis University Law Journal article was written, the Senate Judiciary Committee Subcommittee on the Constitution held hearings September 13, 1983, on the question regarding the potential impact of the ERA on private single sex institutions. The two witnesses who testified were Donna E. Shalala, President of Hunter College, and Jeremy A. Rabkin, Assistant Professor in the Department of Government at Cornell University.

Dr. Shalala stated at the outset of her opening statement that:

> The ERA is central to ensuring women's equal right to education. It will provide women with a permanent constitutional basis to assert that right. It will provide an important constitutional backdrop to the statutes designed to ensure equality and, thus, eliminate any necessity for such statutes to be liberally construed to achieve equality. It will insulate women's rights from political pressures. It will end efforts to repeal existing antidiscrimination statutes to create special exceptions to the equality principle in antidiscrimination statutes, and to limit the remedies or means to enforce equality. Finally, it would free this Congress to implement women's equality in an efficacious and cost effective manner.
>
> Dr. Donna Shalala, Testimony before Senate Subcommittee on the Constitution, September 13, 1983, at p. 1.

Dr. Shalala also emphasized in her statement that

> With the Equal Rights Amendment unless the purpose of sex segregation is to implement principles of affirmative action and to create equal access to full educational opportunities, single sex schools that deny women access to any educational facilities and teaching would be outlawed.
>
> *Id*. At p. 15.

In the questioning at this hearing, Senator Hatch, Chairman of the Judiciary Subcommittee on the Constitution, asked whether the ERA would require all federally-assisted institutions, all private schools and colleges receiving any form of federal funds, to become coeducational? In other words, would single sex private schools be permitted to receive federal assistance? Dr. Shalala responded that these private entities would *not* be permitted to receive federal funds; however, consistent with her formal statement, she stressed again that there would be an "exception...for the women's colleges...which demonstrated that they continued for the purposes of eliminating past discrimination and for affirmative action." Transcript of Proceedings, Hearing on ERA, Before Subcommittee on the Constitution, Senate Judiciary Committee, September 13, 1983, at p. 21. Dr. Shalala stated that this would be the only exception and remarked further, however, that men's single-sex colleges would be eliminated under the ERA. *Id*.

Dr. Shalala did make a distinction between educational institutions and religious institutions. She stated:

> The Bob Jones decision... distinguished between educational institutions and religious institutions and...

> those essentially educational institutions which had some religious purpose. And in the case of Bob Jones, while the Court did not compel the IRS to remove their tax exemption because of racial discrimination, it did say that the IRS could. I would not expect the Court to go beyond that, and that is to give the option in the case of sex discrimination if the ERA took place. The major distinction would be that single-sex women's institutions, which provided a justification based on affirmative action or eliminating previous discrimination would be allowed.
>
> *Id.* at pp. 22-23.

Senator Metzenbaum posed the question of how any single sex educational entity could survive under the ERA. He expressed bewilderment concerning the fact that there could be an exception, for example, for affirmative action purposes as stated by Dr. Shalala. *Id.* at pp. 27-34.

Senator Hatch focused on the Supreme Court's decision in the *Bob Jones University* case and posed the question whether under the ERA all single sex institutions must be denied their tax exempt status. Dr. Shalala's response was:

> What the Court said in Bob Jones is that the IRS can, but is not compelled to, remove tax exemption for educational institutions that discriminate on the basis of race. I would expect the court to do no more and no less than that on the subject of sex.
>
> *Id.* at p. 41.

Senator Hatch also asked the question whether under the ERA it would be constitutional for federal or state laws to allow charitable tax deductions for private contributions to single-sex private educational institutions. Dr. Shalala responded in the negative, i.e. such deductions would not be permissible.

In sum, Dr. Shalala seemed to be of the opinion that the ERA would not permit single sex private schools to continue to receive any form of federal assistance, be it in the form of loans, scholarships, grants, or textbooks. Id. at p. 49. The only exception to Dr. Shalala's interpretation of the ERA's ban on sex segregated educational institutions were those which were correcting past discrimination against women, i.e. those that could demonstrate affirmative action. Dr. Shalala also argued that, "The ERA would not prohibit the existence of fraternities as purely private entities even at public institutions, unless they themselves were supported with public funds, or they were so integrated into the academic life of the institution." Id. at p. 66.

Assistant Professor Jeremy A. Rabkin testified at the same hearing on September 13, 1983, as Dr. Shalala. He did not agree with a number of the points she made concerning the potential impact of the ERA on private single sex schools. First of all, he addressed the matter of ERA's effect on direct subsidies. Here he drew a distinction between Title IX of the 1972 Education Amendments and Title VI of the 1964 Civil Rights Act. Title IX prohibits sex discrimination in "any education program or activity receiving federal financial assistance." 20 U.S.C. 1681—1686. Title VI prohibits discrimination based on "race, color or national origin" in any federally funded program. 42 U.S.C. 2000d.

Assistant Professor Rabkin pointed out that Title VI was understood at the time it was adopted to "embody a constitutional requirement that government not give direct aid to racial discrimination." Testimony of Assistant Professor Jeremy A. Rabkin, Department of Government, Cornell University, before Senate Judiciary Subcommittee on the Constitution, September 13, 1983, at p.2. He distinguished Title IX from Title VI by stating that Title IX "was not conceived as implementing a constitutional obligation in regard to sex discrimination," and therefore, the prohibition in Title IX was subject to exceptions. *Id.* He argued that, "By constitutionalizing an absolute prohibition of government involvement in discrimination, the Equal Rights Amendment would effectively eliminate these exceptions in Title IX." *Id.*[2/] He saw the ERA as prohibiting direct federal grants as well as state assistance to any single sex school. He further contended that the ERA would provide no exemption for religious schools. *Id.* at p. 3. Assistant Professor

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[2/] This argument that Title VI was conceived as implementing a constitutional obligation with respect to discrimination while Title IX was not is the subject of much controversy among constitutional law scholars and is still an unsettled part of the law with respect to even judicial interpretation. While a thorough discussion of this issue is beyond the scope of this report, since the argument has been made, we believe it necessary to at least draw attention to the controversy and to cite relevant authority concerning the legal problem.

See Abernathy, Charles F. "Title VI and the Constitution: A Regulatory Model for defining 'Discrimination'," 70 Georgetown L.J. 1 (October 1981) (Abernathy argues that an examination of the legislative history for Title VI shows that Congress never intended to "mimic" the Constitution's equal protection clause nor to create a new rigid standard. Instead, he contends that Congress adopted, as part of a complicated compromise, a regulatory model for Title VI that gave federal administrative agencies the authority to define the discrimination prohibited by Title VI.); *Guardians Association v. Civil Service Commission*, 103 S. Ct. 3221 (1983) (a deeply divided Court ruled that Title VI, together with its implementing regulations, prohibits actions having a disparate impact on minorities; however the Court granted

(continued)

Rabkin's primary message was that private single sex colleges as well as religious educational entities, i.e. any schools that try to maintain a fixed sexual ratio in their student body, would probably have to "face some painful financial sacrifices to retain their established character." Id.

Assistant Professor Rabkin saw the ERA as having its greatest impact on private single sex institutions through its implications for tax policy. Here he relied to a large extent on the Supreme Court's decision in the Bob Jones University case. He stated:

> First, the Court held that recognition as a "charitable organization--one eligible for tax exempt status--must be withheld from institutions involved in any activity that is "contrary to fundamental public policy."...The Supreme Court held that the IRS was...justified in revoking the tax exempt status of Bob Jones University because, if it had been a state institution, constitutional rulings would plainly have prohibited the school from maintaining a ban on interracial dating. This was enough to prove, as the Court saw it, that Bob Jones University was acting "contrary to fundamental public policy."

(Continued) only prospective, noncompensatory relief for such unintentional discrimination); Rendell - Baker v. Kohn, 457 U.S. 830 (1982) (a private school, whose income is derived primarily from public sources and which is regulated by public authorities, did not act "under color of state law" when it discharged certain employees).

See also the Supreme Court's 1984 decisions in Grove City College v. Bell, 52 U.S.L.W. 4283 (Feb. 28, 1984) and Consolidated Rail Corp. v. Darrone, 52 U.S.L.W. 4301 (Feb. 28, 1984). In Consolidated Rail Corp., see especially footnote n. 13.

> ...it is indisputable that if the E.R.A. is added to the Constitution, it will make opposition to sex discrimination a matter of "fundamental public policy." Following the Court's ruling in Bob Jones, then, it seems inescapable that all single-sex institutions must be denied tax exemptions. Thus the E.R.A. would not only make all-women colleges ineligible for tax exemptions, but also Catholic seminaries, for example — unless they admit women for training to the priesthood.
>
> Id. at 4.

With respect to the Bob Jones decision, however, even Assistant Professor Rabkin recognized that there may be a distinction between it and the ERA. He specifically stated that the Supreme Court left itself "a possible escape hatch" by basing its decision in Bob Jones on an interpretation of a statute in the tax code rather than on direct constitutional standards. Id. at p. 6. Thus Assistant Professor Rabkin admitted that, "This may leave room for Congress to rescue the Court, by amending the tax code to clarify that — the E.R.A. notwithstanding — 'the fundamental public policy' against sex discrimination should not extend to religious institutions or to various other private organizations." Id. However, he himself viewed that prospect as unlikely because he saw ERA proponents as avidly lobbying against such a move because of their general commitment to the idea that tax benefits should not be available to institutions discriminating on the basis of sex. Id.

Assistant Professor Rabkin also viewed the ERA as affecting individuals making charitable contributions to private single sex educational entities.

This would derive from the denial of their right to take a tax deduction for the contribution. Id. at p. 8. He saw textbook assistance as being similarly affected by the ERA as tax subsidies. State and federal loan and grant programs would be affected as well. Id. at p. 9. In addition, he went so far as to contend that,

> ...Under the E.R.A., therefore, it it would seem that private schools must be excluded from using any public facility— using a municipal auditorium for a graduation exercise or student concert, for example—if the school itself does not observe approved standards of nondiscrimination in regard to sex. Further it would seem that private organizations cannot maintain any link with public schools or state universities if they fail to meet E.R.A. standards of non-discrimination. Thus, boy scout and girl scout troops may have to be excluded from public school facilities and fraternities and sororities banished from state college campuses (or at least from college owned facilities).
>
> Id. at p. 10.

The major point he seemed to be making was that just as the government could not be involved in any way in encouraging racial discrimination, so it would be true with respect to the sex discrimination ban under the ERA.

Assistant Professor Rabkin concluded his formal statement by indicating that private schools which are unprepared to forego all forms of government assistance would have to be sexually integrated. Id. at p. 11. He did emphasize that the ERA would allow such single sex schools to continue, but the financial cost to them would be very significant. The practical result might be that a large number would not survive. Id.

In his response to questioning at the September 13, 1983, hearing Assistant Professor Rabkin took strong issue with Dr. Shalala's point that private single sex institutions involved in curing past discrimination and promoting affirmative action could survive under the ERA and still receive tax benefits and government aid. Transcript, supra, at p. 26. He specifically stated:

> ...There is simply no parallel doctrine with regard to race discrimination. Neither the Department of Education, the Justice Department, nor any court, so far as I am aware, has ever said, "If you want to be an all-black institution for affirmative action reasons, that is all right, and you can exclude white applicants." There are, in fact, many colleges which were founded decades ago as part of segregated state systems and were, to begin with, all—black, and the Federal government is now going to great trouble to try and integrate those institutions, force them not only to admit whites but to undertake various activities which will make them more attractive to white students.
>
> Since racial segregation is not allowed even for affirmative action reasons, I cannot understand what justification there could be

> for saying, "Well, we will allow
> it in the case of sex discrimination,
> because some women think it is good
> for them."
> *Id.* at p. 26.[3]

Senator Orrin G. Hatch himself addressed the problem of the potential impact of the ERA on private single sex educational institutions in his book, *The Equal Rights Amendment: Myths and Realities*, Chapter 13, 1983. He expressed a concern that the ERA will reach beyond the public sector and prohibit certain acts practiced by private entities as well. He wrote specifically:

> Although the ERA purports
> only to apply to equality of
> rights "under the "law" -- language
> that would seem to limit
> its application to public acts of
> sex classification — similar
> language in the Fourteenth
> Amendment and other constitutional

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[3] It is worth noting that the State of Washington's ERA has been interpreted to allow affirmative action. *See* specifically *Marchioro* v. *Chaney*, 90 Wash. 2d 298, 582 P. 2d 487 (1978). Democratic party members challenged statutes requiring, *inter alia*, that the two representatives from each county elected to the state committee be of opposite sex and that the chairperson and vice chairperson of the state committee also be of opposite sex. The state supreme court ruled that the statutes did not violate the state ERA, holding that there was no discrimination in a statutory plan designed to achieve absolute equality in numbers thus guaranteeing equality of representation. The court interpreted the absolute prohibition standard articulated in *Darrin v. Gould*, 540 P.2d 882 (1975), to require absolute equality in numbers and declared that "one male--one female" plans were a rational means to achieve equality.

It should be noted that this decision represented a departure from the strict absolute prohibition standard previously adopted by the *Darrin* court, and that subsequent decisions reasserted the absolute prohibition standard. The majority opinion in *Marchioro* approved affirmative action in the gender context, i.e. by approving sex-based distinctions in order to compensate for past discrimination. There was a strong dissent in *Marchioro* arguing that the state ERA prohibited all sex-based distinctions.

> provisions has been employed to gradually obscure the distinction between what is public and what is private. This is particularly true with respect to racial classifications. Because gender classifications are currently judged by a slightly different standard than are racial classifications, some of this same legal development is unlikely to occur in the area of sex under the present Constitution. Under the ERA, however, which attempts to liken the standards for race and sex classification, this same process of obscuring the public and private sectors is likely to take place.
>
> Hatch, Orrin G. The Equal Rights Amendment: Myths and Realities, p.67 (1983).

Senator Hatch pointed to the area of private and parochial schools as a good example. First, he noted that the private single sex schools which receive some form of public assistance, be it incidental or indirect, "would almost surely be required to 'integrate' or else risk loss of all such assistance." Id. at p. 68. According to the Senator, this would include both the institutions which receive direct federal, state or local assistance and those entities whose students receive some measure of federal scholarship aid. Id. In addition, Senator Hatch interpreted the Bob Jones University decision as a forerunner for the Court's application of the "fundamental public policy" doctrine to sex under the ERA. Id. at p. 70. He concluded that:

> Once the policy is accepted that tax-exempt status can be restricted in the case of private, church-related schools which do not treat boys and girls in accord with the

> dictates of the ERA, it is not a very long step toward a policy of denying such status to the religious institutions themselves. Those churches whose doctrine requires differing treatment for men and women in such matters as ordination, attendance at religious services, religious education, or other ritual, would find themselves subject to constitutional challenge under the ERA, either to deny them such public "benefits" as tax-exempt status, or to require them to adopt new policies in the treatment of men and women.
>
> *Id.* at p.70.

In summary, the views expressed by individuals concerning the potential impact of the ERA on private single sex educational institutions have been varied. Before the proposed amendment could even reach these entities, they must in some way be "state actors." There is initially a debate over the extent to which the government and the private entity must be intertwined to trigger the ERA's application. In other words, the question is whether a private actor has adequate government contacts to make applicable to its activities the constitutional prohibitions on discriminatory governmental conduct. The answer to this question lies in one's interpretation of the Supreme Court's recent precedents regarding the "state action" doctrine. The opinions of the authorities quoted and discussed above vary.

One scholar believed that the "state action" doctrine was such that in and of itself it could not trigger the ERA's application to private single sex institutions requiring them to adhere to the constitutionally required standards for government conduct. Specifically, this authority wrote:

> The number and variety of the foregoing cases, and the minute attention to all the determinable facts of state contact which they reflect, demonstrate that the privately sponsored single-sex college whose admissions policies are challenged under a theory of governmental action under the proposed Equal Rights Amendment must be prepared to demonstrate the absence of significant governmental involvement in its activities. Such a demonstration will require the most careful and objective analysis of all facets of the institution's governmental relationships. *Nevertheless, it does not appear that there are any necessary or universal relationships between privately sponsored colleges and government which would warrant the conclusion, that these colleges must be held to governmental standards of non-discrimination under the proposed Amendment*.
>
> 18 St. Louis University L.J. 41, 64 (Fall, 1973). (Emphasis added.)

Dr. Shalala of Hunter College testified before the Senate Judiciary Subcommittee on the Constitution that the ERA would require integration of all single sex private schools receiving any form of direct or indirect public funds, including tax exemptions. The only exception to her conclusion would be those all-women schools which based their principles on affirmative action and were intent on eradicating the effects of past discrimination.

Assistant Professor Rabkin of Cornell University testified before the same subcommittee that the "state action" doctrine would not bar application of the ERA to private single sex educational institutions.

He stated: "The language of the proposed Equal Rights Amendment is addressed to the state and federal governments. Many people therefore assume that its effects will be limited to public schools and state universities. This view is certainly mistaken... private institutions may be much more seriously and directly affected by the E.R.A. than their public counterparts." Rabkin, Testimony, supra, at p. 1. (Sept. 13, 1983).

Senator Orrin G. Hatch also did not regard the "state action" doctrine as an impediment to the application of the ERA to private entities. He drew attention to the "more creative interpretations of what constitutes 'public assistance'" and noted that should they prevail, "a purely private school might find itself under legal attack because it was State-licensed, serviced by public utilities, the subject of distinctive tax treatment, or the beneficiary of distinctive tax treatment, or the beneficiary of highway or other public improvements." Hatch, The Equal Rights Amendment: Myths and Realities, supra, at pp. 68-69. According to the Senator, "The entire thrust of recent constitutional history has been to expand the notion of what constitutes 'State assistance' or 'State action' and to obscure the distinction between the public and private sectors." Id.

The other side of the problem concerning the potential impact of the ERA on private single sex institutions does not have anything to do with the "state action" doctrine. Instead, the second issue involves the matter of putting the government in the position of encouraging discriminatory practices prohibited by the Constitution.

For example, could the government continue to give money to private schools which only admit one sex but not the other? Dr. Shalala argued that the government could only continue to do so with respect to the all-female institutions which were operating under affirmative action principles. According to her, the all-male schools would have to integrate. At the September 13, 1983 hearing, Senator Metzenbaum questioned her reasoning with respect to that view which she expressed consistently throughout her testimony. He inquired as to how there could be such an exception to the absolute principle of equality between the sexes under the proposed ERA. Assistant Professor Rabkin and Senator Hatch both expressed the opinion that the government assistance in whatever form would have to come to a halt with respect to those private institutions which differentiated between the sexes. These schools could continue to exist, but would have to do so without the benefit of government aid. They even saw the impact reaching parochial schools and drew analogies from the Bob Jones University decision. Senator Hatch went so far as to state that the ERA could reach into the affairs and practices of religious institutions themselves.

The author of the 1973 St. Louis University L.J. article did not go as far as Senator Hatch or Assistant Professor Rabkin in her conclusion regarding the effect of the proposed ERA on public assistance (grants, tax exemptions, student support) to the private single sex institution, but she did conclude that the private entity electing to adhere to a single sex policy would do so at the price of sacrificing governmental support in some form. She did emphasize that, "Government will be prohibited from sustaining, through the private college, discrimination which it could not practice directly." 18 St. Louis University L.J. 41, *supra* at 74 (Fall, 1973).

The next portion of this report will turn to an examination of the language of the proposed ERA, H.J. Res. 1/S.J. Res. 10 and the "state action" doctrine as it has evolved through the Supreme Court's interpretation of the equal protection clause in the Fourteenth Amendment.

DISCUSSION OF H.J. RES 1/S.J. RES. 10 — THE STATE ACTION DOCTRINE AND SEX AS A PROHIBITED CLASSIFICATION

The proposed Equal Rights Amendment, as reintroduced in the 98th Congress in H.J. Res. 1 and S.J. Res. 10, provides that—

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.

This wording of the amendment is identical to that passed by the 92nd Congress in 1972. In 1971, in response to objections from Senator Ervin and several constitutional lawyers, the wording of the enforcement language contained in the second section (which had read since 1943: "Congress and the several States shall have power within their respective jurisdictions, to enforce this article by appropriate legislation") was changed to conform to the enforcement language of most of the other twenty-six constitutional amendments now in effect.

Much uncertainty surrounds the meaning of the proposed language. Clarification depends, of course, to a great extent on the legislative history the 98th Congress develops through the course of the hearings held, reports issued, and floor debates. While an extensive legislative record exists with respect to the 92nd Congress proposal, H.J. Res. 208, that history is only instructive and not controlling with respect to the current measure because the actions of one Congress do not bind a future Congress. Therefore, it is up to the 98th Congress to develop its own legislative history for H.J. Res. 1 and S.J. Res. 10.

In addition to looking to the legislative history to determine what the proposed ERA means, guidance may be found in contemporaneous court decisions, the rationales used, and the standards of review applied to sex-based classifications under the equal protection clause of the Fourteenth Amendment.

Earlier Congresses have found little disagreement with the general intent of the proposed amendment. A Senate Judiciary Committee report in 1972 (S. Rep. No. 92-689, 92d Congress, 2d Sess.) interpreted the statement "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex" to mean that sex should not be a factor in determining the legal rights of men and women; that the Amendment would affect only governmental action, with the private actions and private relationships of men and women left unaffected unless these rise to the level of state action; and that the only requirement of the Amendment was equal treatment of individuals. The proposed Amendment also gives Congress power to enforce these provisions (the States already possess such authority under their general police power) and provides that the Amendment shall take effect two years after the date of ratification, i.e. after three-fourths or 38 states have approved the proposal. The two year period is provided presumably for the purpose of giving state legislatures and the Congress time to amend their laws to bring them in conformity with the intent of the proposed ERA.

The effect of the ERA, according to the 1972 Senate Report, would be to require that government at all levels, federal, state and local, treat men and women equally as citizens and individuals under the law. It would eliminate from the law sex-based classifications that specifically deny equality of rights or violate the principle of nondiscrimination with regard to sex. Thus, federal or state laws or official practices that now make a discriminatory distinction between women and men would be invalid under the ERA, and certain responsibilities and protections which once were, or are now, extended only to members of one sex would have to be either extended to both sexes or eliminated entirely.

In determining what the potential impact of the proposed ERA would be on a particular subject such as abortion, the military, veterans preference, homosexuals or private single sex educational institutions, one would generally have to pose the same framework of analysis consisting basically of four separate questions: (1) Is there state action? (2) Is there a sex-based classification present? (3) If the sex-based classifications are facially neutral, does a plaintiff have to prove intent to make out a prima facie case or is proof of impact sufficient to establish discrimination? (4) What standard of review applies? —rational basis, intermediate, or strict scrutiny? With respect to the subject of private single sex educational institutions, the major issue that has to be resolved at the very outset is question one, i.e. is there state action?

(a) *Analysis of the "State Action" Doctrine*

Since the proposed constitutional amendment would apply only to cases of discrimination involving governmental or state action, its reach would be similar to that of the Fourteenth Amendment.

The proposed ERA provides in pertinent part:

> Section 1. Equality of rights under the law shall not be denied or abridged *by the United States or by any State on account of sex.*
>
> Section 2. *The Congress shall have the power to enforce, by appropriate legislation,* the provisions of this article.
>
> (Emphasis added.)

This proposed constitutional amendment is based largely on Section 1 of the Fourteenth Amendment. That Amendment by its express terms provides that "[n]o State..." and "nor shall any State..." engage in the proscribed conduct. As was stated in one Supreme Court decision:

> [T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.
>
> *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

Then, in another case, the Supreme Court pointed out:

> It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and broader scope. It nullifies and makes void action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws.
>
> *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

It is quite clear that when a state, through its legislature, commands a discriminatory result, that constitutes state action condemned by the first section of the Fourteenth Amendment, and the statute enacted is void. United States v. Raines, 362 U.S. 17, 25 (1960).[4] Justice Frankfurter once wrote, "the vital requirement is State responsibility that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with state power, into any scheme" to deny protected rights. Terry v. Adams, 345 U.S. 461, 473 (1953).[5]

The complexity of the state action doctrine becomes apparent when the Court is confronted with challenges to conduct that is not so clearly the action of a state but is, perhaps, the action of a minor state official not authorized so to act and perhaps forbidden to act in such a manner by state law, or is, perhaps on the other hand, the action of a private party who has some relationship with governmental authority.

The continuum of state action ranges from obvious legislated denial of one of the guarantees of Section 1 of the Fourteenth Amendment to the point at which private action is no longer so significantly related to state action that the Amendment does not apply at all. When the discrimination is being practiced by private parties, the question is basically whether there has been sufficient state involvement to bring the Fourteenth Amendment into play. In short, the private action is not constitutionally forbidden

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[4] A prime example is the statutory requirement of racially segregated schools condemned in Brown v. Board of Education, 347 U.S. 483 (1954).

[5] Justice Frankfurter wrote a concurring opinion in Terry v. Adams, and he was speaking specifically of the state action requirement of the Fifteenth Amendment.

"unless to some significant extent the State in any of its manifestations has been found to have become involved in it." Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). There is no clear formula to apply to determine whether or not state action exists. The facts of each situation have to be examined separately.

The Court has made clear that governmental involvement with private persons or private corporations is not the crucial factor in determining the existence of state action. Instead, the Court has said that, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)(under the Due Process Clause). In other words, the state has to be involved with the particular activity of the institution that actually inflicted the injury on the plaintiff, i.e. the state action, and not the private, has to be the subject of the complaint.

It should also be noted that the receipt of federal funds alone does not imbue a private institution with state action. Greco v. Orange Mem. Hosp. Corp., 513 F.2d 873 (5th Cir.), cert den., 423 U.S. 1000 (1975); Wahba v. New York Univ., 492 F.2d 96 (2nd Cir.), cert. den., 419 U.S. 874 (1974); N.Y.C. Jaycees v. U.S. Jaycees, 512 F.2d 856 (2nd Cir. 1976).

In 1976, the Supreme Court narrowed or tightened the state action doctrine even further by holding that plaintiffs, seeking to have withdrawn governmental tax benefits accorded to private institutions that allegedly discriminated against complainants and thus involved the government in their actions must in order to be able to bring their suit show that revocation of the benefit would cause the institutions to cease the complained of conduct. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). *See id*. at 46, 63-64. Justice Brennan concurring and dissenting.

During the 1982 Term, the Supreme Court handed down three decisions which appear to be consistent with the trend of narrowing or tightening the state action doctrine: *Blum, Commission of the New York State Department of Social Services v. Yaretsky*, 457 U.S. 991 (1982) (no "state action" in nursing homes' decisions to discharge or transfer Medicaid patients to lower levels of care; thus respondents failed to prove petitioners violated rights secured by the Fourteenth Amendment); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982)(a private school, whose income is derived primarily from public sources and which is regulated by public authorities, did *not* act "under color of state law" when it discharged certain employees); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982) (no "state action" insofar as petitioner alleged only misuse or abuse by respondents of Virginia law; but "state action" exists to the extent that petitioner's complaint challenged the state statute as being procedurally defective under the Due Process Clause).

In *Blum v. Yaretsky*, *supra*, the Court looked very carefully at the nursing homes and their specific actions in discharging or transferring Medicaid patients to lower levels of care. The precise question addressed was whether the state could be held responsible for those decisions so as to subject them to the strictures of the Fourteenth Amendment. In concluding that there was no "state action," the Court looked at the following: (1) the fact that nursing homes in New York are regulated by the State; (2) whether the state exercised coercive power or provided significant encouragement causing the nursing homes to so act; (3) whether the private entity, i.e. nursing homes, exercised powers that are traditionally the exclusive prerogative of the state. In its decision the Court stated:

> These regulations do not require the nursing homes to rely on the forms in making discharge or transfer decisions nor do they demonstrate that the State is responsible for the decision to discharge or transfer particular patients. Those decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State... nothing in the regulations authorizes the officials to approve or disapprove decisions either to retain or discharge particular patients, and petitioners specifically disclaim any such responsibility. Instead, the State is obliged to approve or disapprove continued payment of Medicaid benefits after a change in the patient's need for services... Adjustments in benefit levels in response to a decision to discharge or transfer a patient does not constitute approval or enforcement of that decision. As we have already concluded, this degree of involvement is too slim a basis on which to predicate a finding of state action in the decision itself...
>
> As we have previously held, privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of Burton. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357-358. That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.
>
> We are also unable to conclude that the nursing homes perform a function that has been "traditionally the exclusive prerogative of the State." Jackson v. Metropolitan Edison Co., supra, at 353.
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> 457 U.S. at 1008, 1010-1011.

Similarly, in Rendell-Baker v. Kohn, supra, decided on the same day as Blum v. Yaretsky, the Supreme Court invoked a very stringent interpretation of the state action doctrine. The Court addressed the question whether a private school, whose income comes primarily from public sources and which is regulated by public authorities, acted under color of state law when it discharged certain employees. The Court concluded that the school's action did not constitute state action, and in its rationale it relied to a great extent on Blum v. Yaretsky, supra. The Court stated specifically that:"... the school's receipt of public funds does not make the discharge decisions acts of the State." 457 U.S. at 840. The Court went on to point out:

> The school, like the nursing homes, is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts. Id. at 840-841.

In Rendell-Baker, the Court found that the discharge decisions made by the school personnel were neither compelled nor influenced by any state regulation. The Court observed:

> . . . in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters. The most intrusive personnel regulation promulgated by the various government agencies was the requirement that the Committee on Criminal Justice had the power to approve persons hired as vocational counselors. Such a regulation is not sufficient to make a decision to discharge, made by private management, state action.
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> Id. at 841-842.

The Court applied the "public function" test in Rendell-Baker in a very stringent manner also noting that the critical question was whether the function performed was traditionally the exclusive prerogative of the state. There was no denying that the education of these maladjusted children was a public function, but this was only the beginning of the Court's analysis. The Court wrote:

> Chapter 766 of the Massachusetts Act of 1972 demonstrates that the State intends to provide services for such students at public expense. That legislative policy choice in no way makes these services the exclusive province of the State... That a private entity performs a function which serves the public does not make its acts state action.
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> Id. at 842.

Finally, in Rendell-Baker, the Court held there was no "symbiotic" relationship between the state and the school. It found that the school's fiscal relationship with the state was no different from that of many contractors performing services for the government.

Thus, from the language quoted above in Blum v. Yaretsky and Rendell-Baker v. Kohn, it is apparent that the Supreme Court does not find state action present in given factual situations without first applying very strict standards. This is evident as well in the Lugar v. Edmondson Oil Co., Inc. case, 457 U.S. 922, which it decided on the same day. The Court spelled out the stringent mode of analysis employed and the rationale behind it:

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the state, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to

> require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.
>
> Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the state. These cases reflect a two-part approach to this question of "fair attribution." First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.
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> 457 U.S. at 936-937.

It is certainly clear from the language in the proposed ERA and from the fact that it is modelled on the Fourteenth Amendment that to some extent it covers situations where there is state action. The foregoing discussion, however, has shown that the Court has over the years narrowed its concept of what constitutes state action to warrant bringing the Fourteenth Amendment into play. Short of actual state enacted legislation meeting the requirements of the state action doctrine, its existence or presence becomes less clear, and courts have to examine the facts and weigh the circumstances in each situation.

In determining what might be the potential impact of the proposed ERA upon private single sex educational institutions, one would have to examine the factual situation very closely and analyze the number and nature of the contacts the private entity has with the government. This would be the essential first step in the consideration of the question whether the ERA would require such private single sex educational institutions to integrate.

It would seem safe to speculate that the proposed ERA would not by its own force interfere with the practices of private single sex schools that are purely private and have either no involvement or minimal connection with the federal, state or local government insufficient to meet the Supreme Court's most recent interpretation of what constitutes state action.[6] Section 1 of the proposed ERA is prohibitory only upon the federal government and the state governments, and on its face, does not reach private conduct. By the same token, it is possible that,

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[6] The U.S. Supreme Court's recent decision in Grove City College v. Bell, 52 U.S.L.W. 4283 (Feb. 28, 1984) can be distinguished from the question of the potential impact of the EPA on private single sex educational institutions because the issue in Grove City revolved around the scope of coverage of a statute, specifically Title IX of the Education Amendments of 1972. Here the Court was interpreting the meaning of the language in Title IX and was trying to determine Congress' intent by examining the legislative history. Grove City was a case of statutory construction. The Court held that federal assistance to students constitutes federal aid to the private educational institution itself, thus making the requirements of Title IX applicable to the school. Therefore, if Grove City wanted to continue to admit students who were recipients of federal funds, it would have to sign the assurance of compliance form agreeing not to discriminate and to comply with Title IX's mandate. The Court went one step further, however, and held that the enforcement mechanism, i.e. cut-off of federal funds, was to be program specific and not institution-wide. Hence in the instance of Grove City the cut-off would apply only to the financial aid program of the school.

Because the Court's decision in Grove City was an interpretation of a statute and not of a provision in the Constitution, Congress is free to amend the statute to change its language and meaning if it believes the

Congress' power under Section 2 of the proposed ERA to enforce Section 1 would be similarly limited. See Civil Rights Cases, 109 U.S. 11 (1883).[7] However, any conclusions as to Congress' power to reach private discrimination may be less clear-cut by virtue of the lengthy statement Justice Brennan appended to the Court's decision in United States v. Guest 383 U.S. 745 (1966), which dealt with the analogous issue in the Fourteenth Amendment context. A majority of the Justices joined Brennan in arguing that Congress' power was not so narrow as to be limited by the state action requirement.

In United States v. Guest, the Court upheld an indictment under 18 U.S.C. 241, a statute imposing criminal penalties for certain civil rights violations. Specifically, section 241 prohibits conspiracies to deprive citizens of civil rights and is a felony offense. In Guest, the Court upheld an indictment under section 241 of six individuals who allegedly had conspired to deprive blacks of their right to use state facilities and to travel in interstate commerce. Although the Court read into the indictment an allegation of state action, six Justices expressed the view

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(continued) Court misinterpreted the law in question. Such would not be possible if the Court's ruling was based on an interpretation of the Constitution, e.g. the Equal Rights Amendment. The only way the Congress can change the Court's interpretation of a provision in the Constitution is by proposing a constitutional amendment. However, it is possible that the ERA would not ever reach a school like Grove City because of the absence of state action.

[7] Justice Harlan's dissent reasoned that Congress had the power to protect rights secured by the Fourteenth Amendment against invasion by both state and private action but also viewed places of public accomodation as serving a quasi-public function which satisfied the state action requirement. Id. at 46-48, 56-57.

that Section 5 of the Fourteenth Amendment authorizes legislation proscribing wholly private conduct. Responding to language in Justice Stewart's opinion for the Court implying a 'state action" limitation on Congress' legislative authority, Justice Brennan, joined by a majority of his brethren, argued for broader congressional authority:

> Although the Amendment itself... 'speaks to the State or to those acting under the color of its authority', legislation protecting rights created by that Amendment,' such as the right to utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather § 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under the Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection.
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> 383 U.S. at 782.

Within that authority is the 'power to determine that in order adequately to protect the right to equal utilization of state facilities is is also appropriate to punish [private] individuals' who would deny such access. Thus, under the Guest rationale, private conspiracies to interfere with equal protection or due process rights protected by the Fourteenth Amendment may be within the reach of Section 241. Nonetheless in light of changes in the Court's membership and absent definitive adjudication, the matter is not free of all doubt. Furthermore, the limits and potential of that rationale are uncertain, whether it is only with regard to "state facilities" that Section 241 reaches private interference, or what "rights" are encompassed within the concept of "Fourteenth Amendment rights."

In addition, it must be emphasized that the consensus expressed by six Justices in *Guest*[8] that Section 5 of the Fourteenth Amendment empowers the Congress to enact laws punishing all conspiracies, with or without state action, that interfere with Fourteenth Amendment rights was *dicta* in the case since Justice Stewart, who authored the Court's opinion, found the allegations sufficient to sustain a charge of State-sanctioned deprivation of equal protection rights that he apparently deemed essential to a Section 241 prosecution.[9]

8/ Clark, J., with the concurrence of Black and Fortas, JJ., joining the opinion of the Court, and Brennan, J., joined by Warren, Ch. J., and Douglas, J. concurring in part and dissenting in part.

9/ In this opinion, Justice Stewart stated:

> In this connection, we emphasize that § 241 by its clear language incorporates no more than the Equal Protection Clause itself; the statute does not purport to give substantive, as opposed to remedial, implementation to any rights secured by that Clause... It is commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under color of its authority. The Equal Protection Clause 'does not... add anything to the rights which one citizen has under the Constitution against another.'... As Mr. Justice Douglas more recently put it, 'The Fourteenth Amendment protects the individual against *state action*, not against wrongs done by *individuals*.' (citations omitted)...
>
> This has been the view from the beginning.... It remains the Court's view today.
>
> 383 U.S. at 755.

At the same time, Justice Stewart narrowly limited his views to Section 241 and did not purport to address the question of what kinds of other and broader legislation Congress might constitutionally enact under § 5 of the Fourteenth Amendment to implement that Clause or any other provision of the Amendment.

Moreover the reported Federal court decisions since *Guest* to sustain a Section 241 prosecution based on due process or equal protection violations have involved alleged interference in state elections[10] and the right to a jury trial[11] where the requisite complicity of state officials to support a finding state action was present. Thus, it may be generally stated that the scope of Congress' authority to reach private conduct interfering with Fourteenth Amendment rights has yet to be definitely resolved.

In sum, on its face, the proposed ERA would reach only state action. It would place a limitation on governmental entities, prohibiting gender-based discriminatory activities on their part. The proposed ERA provides that equality of rights under the law cannot "be denied or abridged *by the United States or by any State*" because of sex. (Emphasis supplied). As such, the potential impact of the proposed ERA on private single sex educational institutions using gender as a basis for admission can only be determined after examining the specific factual circumstances surrounding the particular school and its relationship vis a' vis the government — federal, state or local. As recent U.S. Supreme Court decisions indicate, the Court has tightened up on its interpretation of the state action doctrine. If state action exists, then the proposed ERA would apply. In the absence of state action, it is unsettled whether the enforcement authority in Section 2 of the proposed ERA, which parallels Section 5 of the Fourteenth Amendment, could reach private action.

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[10] *See*, e g. *United States v. Stollings*, 501 F.2d 954 (4th Cir. 1974). *United States v. Anderson*, 481 F.2d 665 (4th Cir. 1973), aff'd 417 U.S. 211 1974).

[11] *United States v. O'Dell*, 462 F.2d 224 (6th Cir. 1972); *United States v. Purvis*, 580 F.2d 853 (5th Cir. 1978).

If there is no state action, and the courts were to take a narrow view of Congress' enforcement authority in relation to private conduct, the proposed ERA would not have an immediate impact on private single sex educational institutions. Thus, there would be no need to inquire into the type of judicial review and constitutional analysis the Court would apply to the alleged sex-based classification.[12]

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[12] When the legislature passes laws, it makes classifications. Not all classifications are prohibited by the Constitution. It is only an "invidious" classification which offends the Constitution. A court determines whether a classification constitutes invidious discrimination and is violative of the Constitution's equal protection clause by applying a particular standard of review. To date, the Supreme Court has articulated three standards of review: rational basis, intermediate, and strict scrutiny. The rational basis standard is the least stringent, and it requires very little proof on the part of the government to justify the classification. Strict scrutiny is the most stringent form of judicial review and the government must show that the classification is necessary to satisfy a "compelling" state interest in order for the classification to survive constitutional challenge. The intermediate standard is less deferential than the rational basis test and less strict (and less fatal, than the strict scrutiny standard which applies only to situations involving a suspect classification-fundamental interest. To date, under the equal protection clause of the Fourteenth Amendment, the Supreme Court has applied the intermediate standard to gender-based classifications and has not declared sex to be a suspect classification as it has for race. The results concerning whether the classification is unconstitutional are less predictable under the intermediate standard of review than they are under strict scrutiny where in practically all instances the classification fails to meet constitutional muster. (continued)

however, there is another aspect that must be examined to determine if these private single sex schools would be affected by the EPA, and this part of the problem relates to affirmative governmental action.

One further point needs to be made concerning the Supreme Court's standard of review analysis for challenges under the equal protection clause of the Fourteenth Amendment. That is, the party contending that the government discriminated has the burden of proving that there was a pretext or intent for the discrimination. The intent requirement of equal protection litigation is applicable in sex classification cases. Thus, a law which is neutral on its face and which serves ends within the power of government to pursue is not invalid simply because it may affect a greater proportion of one sex than of the other. Discriminatory purpose, motive, animus or intent must be shown. It must be established that the decisionmaker selected or reaffirmed a particular course of action, at least in part because of, not merely in spite of, its adverse effects on an identifiable group. Thus, a veterans preference law which benefited largely but not exclusively men and which had a severe impact mostly but not totally on women was held not invalid under the equal protection clause. Massachusetts Personnel Admn. v. Feeney, 442 U.S. 256 (1979). In Feeney, the complaining party did not show that the government intended to discriminate against women.

(b) Examination of the Issue Regarding Limitations On What the Government Can Do Affirmatively

Another side of the problem to consider concerning the potential impact of the proposed ERA on private single sex educational institutions is totally unrelated to the issue of "state action." This aspect concerns suits against the government, as distinguished from actions against private actors, to enjoin the government from continuing a policy that fosters discrimination. Such an action differs from a suit against a private actor. In a suit to enjoin the offensive conduct of a private actor, the issue is whether there is "state action"—ie. whether the state is operating through the guise of the private actor so that the conduct in question may be attributed to the state itself. On the other hand, in an action to enjoin the grant of state aid or to remove the benefit of a tax exempt status, the issue is whether the state's activities violate constitutional standards of governmental conduct without even considering the effects that the termination of such benefit would have on private conduct. The "action" in the latter instance is clearly state action, and the problem is one of whether the government should be permitted to continue to "encourage" the existence of a discriminatory practice. It is conceivable that after the Equal Rights Amendment is ratified, privately sponsored schools which elect to adhere to a single sex policy may have to do so at the price of governmental support. There is some authority for the idea that the government would be prohibited from sustaining, through the private college, discrimination which it could not practice directly. The result flowing from this principle is that such an institution's eligibility for government grants and subsidies, for tax-exempt status, and the advantage of receiving contributions tax-deductible to the donor would likely be lost. See *Norwood* v. *Harrison*, 413 U.S. 455 (1973) and 74 *Columbia University Law Review* 656, 698 (1974); also *Cornelius* v. *Benevolent Protective Order of Elks*, 382 F. Supp. 1182 (D. Conn. 1974).

(1) Discussion of *Norwood* and *Eastern Kentucky Welfare Rights Organization* Cases

In *Norwood*, the Supreme Court struck down a textbook lending program which extended aid to students attending private schools which were racially segregated. *Norwood* holds that financial aid must be withdrawn by the government from the class of students attending schools whose admissions policies the government could not itself adopt. Arguably, in a suit against the school to stop the discriminatory practice itself, the fact that students were receiving textbooks loaned by the state would not constitute sufficient "state action" to make the private school a "state actor" and thus be subject to the Fourteenth Amendment. However, the *Norwood* case is not concerned with the private school as a potential defendant, but rather the focus is upon the government as a defendant and the effort of the plaintiff would be to try to enjoin the government from assisting a private institution which is carrying out a discriminatory policy.

The U.S. Supreme Court decision, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), raises some questions concerning the ease with which a plaintiff could actually bring such an action against the government. Not only did this case establish very stringent standing requirements, but it also set forth very difficult criteria for a plaintiff to satisfy in order to prove his or her case.

In *Eastern Kentucky Welfare Rights Organization*, indigents as well as organizations representing indigents brought an action against the government after the Internal Revenue Service had issued a Ruling allowing favorable tax treatment to a nonprofit hospital that offered only emergency room services to indigents. The plaintiffs claimed that the Ruling violated the Internal Revenue Code and the rulemaking procedures prescribed by the Administrative Procedure Act. The complaint alleged that each of the indigents had been disadvantaged in seeking needed hospital service because of their indigency; that each of the hospitals involved in these incidents had been determined to be a tax-exempt charitable corporation; and that by extending tax benefits to such hospitals the defendants were "encouraging" the hospitals to deny service to the plaintiffs. The Supreme Court held that the plaintiffs lacked standing to bring the suit because they failed to carry the burden of establishing that, in fact, the asserted injury to indigents was the consequence of the defendants' actions or that prospective relief would remove the harm. In describing the standing requirement, the majority wrote,

> ...when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation.
>
> Id. at 38.

The Court found that the respondents here were not injured in fact, even though some were denied service by a hospital. The Court pointed out that, "... injury at the hands of a hospital is insufficient by itself to establish a case or controversy in the context of this suit, for no hospital is a defendant. The only defendants are officials of the Department of the Treasury, and the only claims of illegal action respondents desire the courts to adjudicate are charged to those officials." Id. at 41.

The Court also discussed the problem of proof, i.e. establishing that "but for" the government's favorable tax treatment, the hospitals in question would grant the services demanded by the indigents. Justice Powell, writing for the majority, remarked that, "It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." Id. at 42-43.

In his dissenting opinion, Justice Brennan concludes that the majority in *Eastern Kentucky Welfare Rights Organization* adopted a 'but for' test which amounts to requiring that a 'line of causation' linking the governmental "encouragement" (eg. tax exemptions) to the practice of the illegal policies by private organizations be precisely and intricately elaborated in the complaint in order to meet the standing requirements. From our reading of the *Eastern Kentucky Welfare Rights Organization* case, we believe that it is possible to conclude that a plaintiff, who tries to bring a suit against the government in an effort to compel it to remove the favorable tax treatment accorded private institutions which engage in discriminatory practices will have an extremely difficult task on two accounts: (1) establishing his or her standing to sue and (2) proving that the private institution affecting him or her a) is dependent upon its tax exempt status; b) would not in the absence of the government's ruling s encouragement elect to forego favorable tax treatment; and c) would make the services available to plaintiff once the allegedly illegal governmental inducement is removed The heavy burden imposed upon a plaintiff as a result of this decision indicates that if the Equal Rights Amendment is ratified, it will be fairly difficult for an individual to successfully challenge the government so as to compel it to deprive private institutions such as the private single sex colleges from enjoying a tax-exempt status simply because they do not admit both sexes.[13/] That the rigorous burden set

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[13/] *Regan v. Wright*. Docket No. 81-970, pending in the 1984 Supreme Court term, involving the standing of private litigants to challenge on a nationwide basis IRS' methods of implementing the nondiscrimination policy, is discussed later in this paper.

Also note, that in *Heckler v. Mathews*, Docket No. 82-1050 (March 5 1984), where the Supreme Court held that the gender-based classification of the Social Security Act's pension offset exception is constitutional Justice Brennan, delivering the opinion for a unanimous Court, addressed

(continued)

forth in *Eastern Kentucky Welfare Rights Organization* has potentially broad ramifications is alluded to in Justice Brennan's dissent when he observed,

> We may properly wonder where the Court armed with its "fatally speculative pleadings" tool, will strike next. To pick only the most obvious examples will minority school children now have to plead and show that in the absence of illegal governmental "encouragement" of private segregated schools such schools would not "elect to forego" their favorable tax treatment, and that this will "result in the availability" to complainants of an integrated educational system? (Citations omitted)....Or will black Americans be required to plead and show that in the absence of illegal governmental encouragement, private institutions would not "elect to forego" favorable tax treatment, and that this will "result in the availability" to complainants of services previously denied? (Citations omitted) ...As perusal of these reported decisions reveals, the lower courts have not assumed that such allegations and proofs were somehow required by Art. III.
> *Id*. at 63-64.

In summary, our research indicates that the proposed Equal Rights Amendment would probably not make a private single sex college, which is tax exempt, susceptible to a state action challenge. There are court decisions supporting the position that tax-exempt status is insufficient government involvement to clothe the college as a "state actor" subject to the mandate of the Fourteenth Amendment. By analogy, the same would probably be true under the Equal Rights Amendment.

(Continued) the standing question to some extent. Slip Opinion at pp. 8-11. *See especially id*., f.n. 9 at p. 11. Justice Brennan's discussion is significant because there appears to be an expansion of *Eastern Kentucky Welfare Rights Organization's* concept of standing. The implication in the distinction made by Justice Brennan between *heckler v. Mathews* and *Eastern Kentucky Welfare Rights Organization* may be that the Court is planning to broaden its law of standing. However, the resolution of this matter must await the Court's ruling in *Regan v. Wright* this term.

ment. Furthermore, in light of the Supreme Court's decision in *Eastern Kentucky Welfare Rights Organization*, there are strong obstacles limiting the ability of a plaintiff to 1) establish standing to sue the government and 2) prove that "but for" the government's favorable tax treatment, the private institution would not be engaging in a discriminatory practice. This case makes the success of suits against the government highly unlikely. If the Supreme Court alters its views during this 1984 Term with respect to suits against the government and the law of standing, this conclusion might be affected.

(2) *Discussion of the Bob Jones University and Goldsboro Cases and Their Successors*

In the context of what the government can and cannot do affirmatively regarding alleged discriminatory practices in private institutions, the Supreme Court recently decided a race discrimination case which might lend some insight into the potential reach of the ERA with respect to private single sex educational institutions. *Bob Jones University* v. *United States*, 639 F.2d 147 (4th Cir. 1980), *aff'd* 103 S. Ct. 2017 (1983).[14/]

In the *Bob Jones University* case, *supra*, the Supreme Court upheld the Internal Revenue Service's (IRS) denial and revocation of tax-exempt status to a private school whose admitted racial discrimination was based on religious belief. The Court held, 8-1, that the IRS properly construed the tax code to deny tax-exempt status to schools that discriminate on racial grounds and that the

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[14/] Consolidated with this case was *Goldsboro Christian Schools, Inc.* v. *United States*, 644 F.2d 870 (4th Cir. 1981), *aff'd* 103 S. Ct. 2017 (1983).

governmental interest in racial nondiscrimination in education is so compelling as to outweigh any burden placed on the school's exercise of their religious beliefs.

Currently pending before the Court is the related case of *Regan* v. *Wright*, 656 F.2d 820 (D.C. Cir. 1981), *cert. gr*. 103 S. Ct. 3109 (1983) (Docket No. 81-970).[15] This case involves the important question of the standing of private litigants to challenge on a nationwide basis IRS' methods of implementing the nondiscrimination policy.

Under the facts of the *Bob Jones University* and *Goldsboro Christian Schools, Inc*. cases, *supra*, both institutions had had their tax exemptions revoked and denied, respectively, because of their racially discriminatory policies. Both schools argued that the IRS lacked the legal authority to impose the nondiscrimination condition on their tax exemption. Both argued as well that even if the IRS had the authority, they were constitutinally exempt from its application because their racial discrimination was mandated by their interpretation of the Bible. The U.S. Court of Appeals for the Fourth Circuit upheld IRS' legal authority to impose the condition of racial nondiscrimination and the application of the condition to religious schools.[16] It is this decision that the Supreme Court affirmed on appeal upholding the IRS policy in every respect.

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[15] Consolidated with this case is *Allen* v. *Wright*, 656 F.2d 820 (D.C. Cir. 1981), *cert. gr*. 103 S. Ct. 3109 (1983) (Docket No. 81-757).

[16] See *Bob Jones University* v. *United States* 468 F. Supp. 890 (D.S.C. 1978), *reversed* 639 F.2d 147 (4th Cir. 1980) and *Goldsboro Christian Schools, Inc*. v. *United States*, 436 F. Supp. 1314 (E.D. N.C. 1977), *aff'd* 644 F.2d 870 (4th Cir. 1981).

In its decision, the Supreme Court said that the IRS properly read into Section 501(c)(3) of the tax code the common law meaning of the term "charitable", that is, "that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy":

> History buttresses logic to make clear that, to warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest. The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred. 103 S. Ct. at 2028-29.

The courts had routinely accepted such a qualification on the meaning of the term "charitable", the Supreme Court said, and Congress manifested a similar intent when it enacted and re-enacted the tax exemption provisions.

The Court cautioned that a determination that a given institution is not charitable in the common law sense "should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy." The majority opinion cited decisions by the judicial branch and complementary actions by Congress and the Executive Branch making clear that racial nondiscrimination in education is such a fundamental policy. Given IRS' broad authority to interpret the tax laws and the "firm public policy on racial discrimination", according to the Court, the IRS properly concluded that a private school that discriminates is not "charitable" within the meaning of the tax code.

Moreover, the Supreme Court pointed out that Congress deliberately acquiesced in IRS' construction of the statute subsequent to 1970. Bills were introduced on the matter, "exhaustive" hearings were held, Congress repeatedly amended Section 501 of the tax code—but it did not alter IRS' ruling regarding the tax-exempt status of racially discriminatory private schools. Even more significant was that Congress in 1976 amended the tax code to deny tax-exempt status to private clubs that discriminate and in so doing explicitly relied on the standard that "discrimination on account of race is inconsistent with an educational institution's tax exempt status."

On the religious liberty issue, the Supreme Court simply asserted that the governmental interest outweighed the burden placed on the schools' free exercise of religion and that no less restrictive means were available to vindicate that interest:

> . . . the government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of the Nation's history. That government interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. 103 S. Ct. at 2035.

Justice Powell concurred in the Court's decision but on the narrower basis that Congress had acquiesced in, and thus ratified by implication, IRS' construction of the statute subsequent to 1970. Justice Rehnquist dissented.

Currently, therefore, the tax exemption of private schools is subject to a condition of racial nondiscrimination. For most of the nation the standards used to enforce that condition are those articulated by the IRS in regulations issued in 1971-1975--that a school formally adopt a policy of racial nondiscrimination, that it publicize that policy in the community it serves, and that it certify annually to the IRS that it adheres to that policy.

The question pertinent to the analysis in this report is whether the Court's decision in the Bob Jones University and Goldsboro Christian Schools, Inc. cases, supra, has any relevance with respect to the potential impact of the ERA on private single sex educational institutions, e.g. will they be able to continue to enjoy a tax-exempt status, if in fact they already have such a benefit?

Jeremy A. Rabkin, Assistant Professor of Government at Cornell University, testified before the Senate Judiciary Subcommittee on the Constitution that he believed the ERA would make opposition to sex discrimination a matter of "fundamental public policy."[17] He specifically stated:

> ...Following the Court's ruling in *Bob Jones*, then, it seems inescapable that all single-sex institutions must be denied tax exemptions. Thus the E.R.A. would not only make all-women colleges ineligible for tax exemptions, but also Catholic seminaries, for example—unless they admit women for training to the priesthood.
>
> Indeed, admitting applicants of both sexes would not be sufficient, according to the *Bob Jones* ruling, unless the institution is oblivious to gender in all its activities...
>
> Testimony of Jeremy Rabkin
> Before Senate Judiciary Subcommittee
> on the Constitution, *supra*, at 4-5.

The Supreme Court's holdings in the *Bob Jones University* and *Goldsboro Christian Schools, Inc.* cases can be distinguished from the issue of whether the ERA would have an impact on private single sex educational institutions.

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[17] A contrary view is implied in *The Supreme Court, 1982 Term*, 97 Harvard L. Rev. 70, 261-269 (November 1983). Specifically, this discussion noted that

> In relying on a public policy requirement specific to section 501(c)(3), the Court made clear that its holding contemplated no generalized right or duty of the IRS—or any other agency—to determine or implement public policy. Consonant with the Court's current retreat from applying constitutional principles in matters of racial discrimination, *the opinion avoided any mention of the constitutional dimension of policies against discrimination in education*.
>
> *Id.* at pp. 261-262. (Footnote citations omitted.) (Emphasis added).

This commentator believed that the main reason for the *Bob Jones University* opinion's apparent weakness was "the Court's failure to acknowledge that in any case involving more than a mechanical rendition of a statute, the Court's interpretive role is not wholly disjunct from its role as the guardian of the Constitution." *Id.* at p. 266. This failing led the author to view the holding in *Bob Jones University* as shedding "little light on the prospects for future, more difficult cases involving relations between the government and discriminatory private institutions." *Id.* at 269.

First of all, these cases involved the Court's interpretation of a statute, not of a constitutional provision. Not only did these two cases represent the Supreme Court's statutory interpretation of the tax code, but also the type of discrimination at issue was race and not gender-based discrimination. The Supreme Court may have a different standard in mind concerning gender, and also, with respect to the tax code situation, Congress could always amend the code to clarify the nature of the "fundamental public policy" against sex discrimination. After all, the Supreme Court was not articulating constitutional standards when it decided the *Bob Jones University* and *Goldsboro Christian Schools, Inc*. cases.[18]

Another factor to consider when trying to distinguish these two race discrimination cases from the ERA private single sex educational institution issue is the crucial role that the particular facts play in each situation. It would be critical to review the historical background concerning the founding of the institution, the policies it has practiced over the years, and the announced purposes of its programs. Courts have to assess such facts in order to ascertain whether the institution is violating the Constitution, be it the Fourteenth Amendment or the proposed ERA should it become ratified.

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[18] *The Supreme Court Review, 1982 Term*, 97 Harv. L. Rev. 70, 261-269 (November 1983) (See *infra*, f.n. 17). Cf. Cover, *The Supreme Court Review 1982 Term—Foreword: NOMOS and Narrative*, 97 Harv. L. Rev. 4, 60-68 (November 1983) (arguing that in *Bob Jones University* the schools' first amendment interests in free exercise of religion were weighty enough to necessitate identifying a constitutional principle to support the Court's ruling).

Recently the Supreme Court agreed to review *Gomez-Bethke* v. *United States Jaycees*, Docket No. 83-724 (52 U.S.L.W. 3497 (January 10, 1984)) and decide the question whether private membership groups that deal with the public have a constitutional right to discriminate on the basis of sex in their choice of members. This case is on appeal by the State of Minnesota. The U.S. Court of Appeals for the Eighth Circuit previously had barred the State of Minnesota from invoking its Human Rights Act to require the Jaycees to accept women as full members. Thus, the case factually involves a situation of sex discrimination by the all-male Jaycees organization and an affirmative attempt by the state to prohibit the single sex membership policy on the theory that this private club has public involvement, e.g. civic activities. At the outset, however, the Court must decide whether the Minnesota law, which forbids sex discrimination by places of "public accommodation", was impermissibly vague as applied to the Jaycees. If the Supreme Court agrees with the Eighth Circuit's earlier holding that the Minnesota law does not adequately define the types of organizations to which it applies, then it may avoid the broader constitutional question of whether members of private organizations have a constitutionally protected "freedom of association" that outweighs the state's interest in forbidding discrimination. However, if the Court does reach that question, then the case could have far-reaching implications extending beyond sex discrimination to race and even ethnic discrimination. In addition, should the Court resolve that question, the constitutionally permissible extent of the government's regulation with respect to mandating nondiscrimination in the private sector would be clarified. Such a ruling would not be addressing the private single sex educational institution situation explicitly but would instead be defining the limits concerning government action to enforce nondiscrimination respecting private organizations. The Eighth Circuit decision had stated that the State of Minnesota's interest in forbidding discrimination on the basis of sex "in places of public accommodation" was not strong enough in the circumstances of the case to be considered "compelling" so as to override this First Amendment right. *United States Jaycees* v. *McClure*, 709 F.2d 1560, 1561 (8th Cir. 1983). The court also ruled that the state law was unconstitutionally vague. However, the court did make it clear that it was *not* saying that no state law could be written to redress this kind of "nongovernmental" discrimination. *Id*. The implication in the split ruling by the Eighth Circuit is that the organization might be guilty of "nongovernmental" discrimination and that an appropriately written state statute might overturn the men-only policy. It remains to be seen how the Supreme Court is going to decide the issue, if in fact it reaches the constitutional question at all.

The other case currently pending before the Supreme Court which may affect interpretation of the potential impact of the ERA on private single sex educational institutions is *Regan* v. *Wright*, Docket No. 81-970. It is consolidated with *Allen* v. *Wright*, Docket No. 81-757. These cases focus on the question of standing to bring certain types of civil rights cases. They follow on the heels of the *Bob Jones University* and *Goldsboro Christian Schools, Inc*. cases, and their significance rests primarily in clarifying procedural questions.

The issue in *Regan* v. *Wright* and *Allen* v. *Wright* is whether federal courts may hear suits brought by taxpayers against the Treasury Department concerning the enforcement of the government's prohibition of tax-exempt status for private schools that discriminate on the basis of race. The Court's earlier holding in the Bob Jones University case would lose its significance if no one could go into court to insure that the government is enforcing its policy. How the Court ultimately decides these two cases involving the standing to sue question will also clarify the matter of whether it intends to adhere to the very narrow concept of standing it articulated in 1976 in the Simon v. Eastern Kentucky Welfare Rights Organization case, supra.

Regan v. Wright and Allen v. Wright, supra, originated in 1976 when parents of twenty-five black school children in seven states filed suit against the Treasury Department in federal district court in the District of Columbia. They claimed they represented a class of several million people and argued that the IRS' manner of enforcing its policy against tax breaks for private schools that discriminate on the basis of race was inadequate. This lawsuit originally sought the imposition of a presumption of guilt standard for judging whether 3,500 target schools should have tax exemptions either denied or revoked. The district court dismissed the suit and in reaching that determination relied on the Supreme Court's ruling in Eastern Kentucky Welfare Rights Organization, supra. See Wright v. Miller, 480 F. Supp. 790 (D.D.C. 1979). On appeal, however, the U.S. Court of Appeals for the D.C. Circuit reversed. Wright v. Regan, 656 F.2d 820 (1981). It did acknowledge that the Eastern Kentucky Welfare Rights Organization decision left "the door barely ajar for third party challenges." Id. at 828. However, the court of appeals did point to a series of race discrimination cases in which the Supreme Court "recognized the right of black citizens to insist that their government 'steer clear' of aiding schools in their communities that practice race discrimination." Id. at 832. These cases cited by the appeals court to support its holding that there was standing included Coit v. Green, 404 U.S. 997 (1971), aff'g mem. Green v. Connally, 330 F. Supp. 1150 (D.D.C.); Norwood v. Harrison, 413 U.S. 455 (1973); and Gilmore v. City of Montgomery, 417 U.S. 556 (1974).

In the Federal Government's brief currently before the Supreme Court in Regan v. Wright, the Solicitor General insists that the court of appeals decision squarely contradicts the principle established in the Eastern Kentucky Welfare Rights case and specifically asks the Court to clarify the uncertainty created by the appeals court ruling concerning the law of standing. The government's brief characterized the parents of the black school children as "mere disappointed observers of the governmental process" who are no more injured than other citizens by the government's policies.

Briefs filed on behalf of the parents called the government's position "fundamentally erroneous" and asked the Supreme Court instead to look to its own decision in Norwood v. Harrison, supra, for proper guidance. It remains to be seen how the Supreme Court is going to resolve this dilemma regarding the standing of third parties to sue the government regarding enforcement of the government's prohibition of tax-exempt status for private schools engaging in racial discrimination. How the Court decides this matter in the race context, and whether it alters the very narrow interpretation set forth in its 1976 decision in Eastern Kentucky Welfare Rights Organization will probably be revealed when the Court rules in Regan v. Wright this term. The holding in that case will be significant as well for guiding an analysis regarding the potential impact of the proposed ERA on private single sex educational institutions.

CONCLUSION

This paper has discussed the problem concerning the potential impact of the proposed ERA on private single sex educational institutions. Generally, the concerns that have arisen center around whether such entities would have to alter their admissions policies and other aspects of the educational program they offer students. In addition, two other issues have been raised which relate to tax policies: (1) whether the ERA would cause private single sex schools receiving no federal funds to lose their tax-exempt status (presuming, of course, that they enjoy such a benefit); and (2) whether the ERA would permit individual taxpayers, who contribute to these tax-exempt private single sex educational institutions, to continue to take tax deductions for their respective contributions. This paper began by summarizing the various views expressed by people who have studied the subject.

The legal problem presented is actually quite complex. An analysis of it, however, does break down fairly conveniently into two parts: (1) whether "state action" is present, thus bringing the entity within the scope of the ERA and (2) whether taxpayer suits can be brought against the government to cause the government to halt any practice which may be involving it indirectly in encouraging the discriminatory practices of the nongovernmental educational institution, e.g. funding, tax exemptions, etc.

The legal effect of the ERA is confined to "state action", as in the case of the Fourteenth and Fifth Amendments. "State action" relates to the nature and degree of government involvement in certain activities, e.g. private activities. Our research and reading of the relevant cases in the area has led us to conclude that various forms of government aid, e.g. grants, tax exemptions, student assistance, would probably not be sufficient to clothe the private single sex school as a "state actor" for purposes of the Fourteenth Amendment. By analogy, the same conclusion would probably be true for the proposed ERA.

With respect to the other side of the problem, unrelated to the issue of "state action" but directly concerned with suits against the government to enjoin the government from continuing a policy that fosters discrimination, the issue is whether the state's activities violate constitutional standards of governmental conduct. The problem is basically one of whether the government should be permitted to continue to "encourage" the existence of a discriminatory practice. Some of our research indicates that it may be conceivable that should the ERA be ratified, privately sponsored schools which elect to adhere to a single sex policy may have to do so at the price of governmental support. There is some authority for the idea that the government would be prohibited from sustaining, through the private educational entity, discrimination which it could not practice directly. The result flowing from this principle is that such an institution's eligibility for government grants and subsidies, for tax-exempt status, and the advantage of receiving contributions tax-deductible to the donor would likely be lost. This conclusion can be derived from the Norwood v. Harrison line of cases.

However, the question of standing surrounds the situation where the government is the defendant and the plaintiff is a party, e.g. a taxpayer, trying to enjoin the government from assisting a private educational institution which is carrying out a discriminatory policy. Having "standing" to bring suit is critical to getting into court. The Supreme Court's rulings respecting the "standing" issue are not completely clear. There is a divergence in the Supreme Court's precedent with respect to the law of standing. On the one hand, there is the Court's 1976 ruling in Simon v. Eastern Kentucky Welfare Rights Organization, supra. It suggests that litigation concerning tax liability is a matter between the taxpayer and IRS, and there is very little room left for third party challenges.

This case established very stringent standing requirements as well as setting forth very difficult criteria for a plaintiff to satisfy in order to prove his or her case. The heavy burden imposed on a plaintiff as a result of this decision indicates that if the ERA should be ratified, it would probably be fairly difficult for an individual to successfully challenge the government so as to compel it to deprive private institutions, such as private single sex schools, from enjoying a tax-exempt status simply because they do not admit both sexes.

While Eastern Kentucky Welfare Rights Organization would make the success of suits against the government highly unlikely, there is another line of cases indicating that black citizens have standing to complain against government action alleged to give aid or comfort to private schools practicing race discrimination, Green, Norwood, and Gilmore, supra.

Currently, pending before the Supreme Court is Regan v. Wright, supra which may be the case in which the Court clarifies the law of standing and the rights of third parties to sue the government. This case is the follow-up to the Court's decision in Bob Jones University and Goldsboro where the Court upheld the IRS policy of either denying or withdrawing the tax-exempt status of private educational institutions that discriminate on the basis of race, a practice contrary to our nation's fundamental public policy. The Bob Jones University and Goldsboro decisions can be distinguished from the question of the potential impact of the ERA on private single sex schools on the ground that these two cases involved race and not sex discrimination and represent a statutory and not a constitutional interpretation by the Court. Nevertheless, the pending Regan v. Wright case is important because it should shed light on the matter of how the government can be made to enforce nondiscrimination.

Another case pending before the Supreme Court which may provide insight into the problem of the potential impact of the proposed ERA on private single sex schools is Gomez-Bethke v. U.S. Jaycees, supra. Here, if the Court reaches the constitutional question, we may have a clearer understanding of what the limits are on government regarding the prevention of nongovernmental discrimination. This case specifically involves alleged sex discrimination on the part of the all-male Jaycees organization and puts before the Court the question of whether private membership groups which deal with the public have a constitutional right to discriminate on the basis of sex in their choice of members; however, the Court may decide to avoid this broader constitutional question. It could do the latter by simply agreeing with the Eighth Circuit that the Minnesota Human Rights Act's prohibition is impermissibly vague as applied to the Jaycees. It remains to be seen what the Court will do. If it does decide the merits of the question of whether members of private organizations have a constitutionally protected "freedom of association" that outweighs the government's interest in forbidding discrimination, its holding could have far-reaching implications, extending beyond sex discrimination to race as well as ethnic discrimination.

In summary, our research indicates that the proposed ERA would probably not make a private single sex school, which is tax exempt, susceptible to a state action challenge. There are court decisions supporting the position that tax-exempt status is insufficient government involvement to make the school a "state actor" subject to the Fourteenth Amendment. By analogy, the same would probably be true under the ERA. Furthermore, in light of the Court's holding in Eastern Kentucky Welfare Rights Organization, there are obstacles limiting the ability of a plaintiff to 1) establish standing to sue the government and 2) prove that "but for" the government's favorable tax treatment, the private institution would not be engaging in a discriminatory practice. Also, there are two pending cases before the Supreme Court this term which may provide greater clarity respecting not only how far the government can intrude on a private entity concerning enforcement of nondiscrimination principles, but also the law regarding standing to sue.

Karen J. Lewis

Karen J. Lewis
Legislative Attoney
American Law Division
March 6, 1984

Statement of the U.S. Commission on Civil Rights
on
Civil Rights Enforcement in Education

June 14, 1983

The U.S. Commission on Civil Rights views with growing concern administration efforts to reduce Federal civil rights enforcement in education. The Supreme Court recently repudiated such efforts in Bob Jones University v. U.S. and Goldsboro Christian Schools v. U.S. There are indications the Departments of Education and Justice still seek to limit long-standing equal educational opportunity guarantees. Their policies, unless promptly reversed, could jeopardize fundamental civil rights protections under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.

Title VI, Section 504, and the Age Discrimination Act prohibit discrimination on the basis of race, color, national origin, handicap, and age in all federally assisted programs. Title IX prohibits sex discrimination in education programs assisted by Federal funds. These laws include specific Federal enforcement requirements. Agencies must establish and enforce policies consistent with the purposes of the laws. If recipients of Federal funds, despite all negotiation efforts, refuse to comply voluntarily with civil rights laws, agencies must terminate funding or enforce their policies by other means, such as requesting the Justice Department to bring suit.

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The debate about Title IX coverage has involved complex, sometimes technical, differences between legal experts. It, however, is not a bureaucratic tug-of-war or an academic exercise. The basic issue is whether the Federal government will continue requiring equal opportunity in the vast majority of programs supported by taxpayer dollars or severely limit its ability to combat discrimination. This is not a technical legal question, but a pressing matter of fundamental national policy developed over more than a quarter of a century. Chief Justice Burger recognized as much when he affirmed broad Federal enforcement authority in Bob Jones, saying "racial discrimination in education is contrary to public policy." The Commission believes similar public policy concerns should govern decisions about Federal efforts to eliminate discrimination on other bases and in other areas.

The Commission, therefore, calls upon the President, as it did on January 6, to take the steps necessary to ensure his administration will stand, with its predecessors, for broad and effective civil rights protections. The Commission urges the Solicitor General, who will be responsible for the Government's brief in Grove City, to develop a position based on the full legislative history of Federal civil rights laws in education. Despite current Education and Justice Department preferences, there is convincing evidence Congress intended Title IX and related laws to prevent any Federal financial support for discrimination.

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THE IMPACT OF THE EQUAL RIGHTS AMENDMENT: THE MILITARY

TUESDAY, NOVEMBER 1, 1983

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:45 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Thurmond, Grassley, DeConcini, Kennedy, and Metzenbaum.

Staff present: Stephen Markman, chief counsel; Randall Rader, counsel; Sharon Peck, chief clerk; Dianne Franke, clerk; and Robert Feidler, minority chief counsel.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. Ladies and gentlemen, this marks the third day of hearings by the Senate Subcommittee on the Constitution concerning the proposed equal rights constitutional amendment. Today, we will again hear testimony on the impact of the amendment on a specific area of the law. The subject for today's hearing will be the impact of the ERA upon military law and policy. Forthcoming hearings by the subcommittee will continue to focus upon the real world impact of the ERA in a wide variety of public policy areas.

As in our earlier hearings, we will only have a small number of witnesses before us today. And while all responsible groups and organizations will eventually be afforded an opportunity to testify, the principal purpose now is to learn in detail the changes that will be effected in law and policy by the equal rights amendment. Our goal is to establish an appropriate and thorough legislative history. We are attempting to do this by allowing both proponents and critics to invite to this panel the most knowledgeable and articulate witnesses available.

I believe that these hearings have proven and will continue to prove most valuable in building the record on what the proposed amendment means. It, after this record is built, the Members of Congress, and the State legislatures, and the public wish the ERA to proceed, I, for one, do not intend to impede or obstruct its passage. I do want to insure, however, that when those votes come, no one can say that he or she does not have available a contemporary legislative history on what changes the ERA will require of society.

It is my understanding that the House of Representatives, following 4 days of hearings, plans to consider the ERA in subcommittee as early as this Friday. After their opening 2 days of hearings, in which 14 out of 15 witnesses testified in favor of the ERA, I am pleased that they have subsequently allowed the opposing viewpoint at least some additional opportunity to testify. I believe that it is in everyone's interest—especially the public interest—to make clear what we are doing when we propose to amend the Constitution of the United States. There is no more serious responsibility that we have as Members of Congress. Whatever one's perspective about the ERA, I think that there is an interest in learning more about its predicted impact.

I very much look forward to your hearing today. We have two outstanding witnesses with us who will enable this body to better understand the effects of the equal rights amendment. I welcome both of them here today.

I would also observe at this point that this subcommittee recently approved legislation S. 501 that would eliminate more than 150 provisions of Federal law that unnecessarily distinguished between men and women. At least 50 of those provisions relate directly to the the military.

Thus, whatever happens to the equal rights amendment, our Federal Code will take less cognizance of the sex of an individual if S. 501 is approved. This matter is scheduled to be considered by the full Judiciary Committee this Thursday, and I think it will be of interest to everybody concerned.

Senator Metzenbaum, we will turn to you.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator **Metzenbaum**. Mr. Chairman, I left the hearing on Judge Clark which just opened this morning and will have to return, but I came over because I am concerned about time elements with respect to this matter.

I know the chairman's record for fairness and I know he wants to have a full and complete record, but having said that, I think that the chairman would also be equally fair in recognizing that these hearings are being dragged out considerably while we explore each of these areas.

In all honesty, my opinion is not one vote will be changed on the committee by reason of the extended hearings. Therefore, it occurred to me if the Chair wanted to make a full and complete record, he could do that equally as well by having written statements submitted on or before a certain date.

I feel very strongly that time is of the essence, and I wonder if the Chair could give me some indication as to when this matter will be disposed of and brought before the full committee for a final determination.

Senator **Hatch**. I cannot say at this point, although I have said that I am not going to obstruct or prevent the ERA from coming to the full committee.

Senator **Metzenbaum**. How long have we had it now in the subcommittee? Are we in the subcommittee?

Senator **Hatch**. This is in the subcomittee.

Senator **Metzenbaum**. How long have we had it in the subcommittee, Mr. Chairman?

Senator **Hatch**. I think since the beginning of the year, just as long as the House has had it.

Senator **Metzenbaum**. Yes, but the House is now going to act on it.

Senator **Hatch**. That is my understanding.

Senator **Metzenbaum**. I wonder if the Chair would not attempt to bring it before the full committee prior to our adjournment on or before November 18.

Senator **Hatch**. I do not think we can. There are a few more hearings that I want to hold on this subject. I do not see any problem with getting the ERA to the floor should the full committee decide to do so.

So we will do our best, Senator Metzenbaum.

But important issues, especially proposed constitutional amendments, deserve a more thorough analysis than written statements can provide. That is why our committee system allows for the questioning of those who have submitted statements. Senators should be able to ask witnesses to more fully explain certain aspects of their statements, to defend their conclusions and to otherwise assist the committee in making a more informed and balanced recommendation.

I think we have moved with dispatch and we intend to continue to do so.

Senator **Metzenbaum**. A year is a lengthy time. There are still women, literally millions of them being discriminated against. I think that the passage of ERA is an imperative, and I think it is doing less than meeting our own responsibilities if we hold this matter for a year in subcommittee.

I know that the chairman wants to be fair.

Senator **Hatch**. That is right.

Senator **Metzenbaum**. But I am concerned that he may be perceived as being unfair if this matter goes beyond adjournment and the full committee is not given an opportunity to vote on it in this session of the Congress, and I would strongly urge upon him that we really have permitted to leave this subcommittee, whether with or without favorable recommendation, and go to the full committee so that the full committee may act and possibly even get it to the floor before we adjourn.

Senator **Hatch**. Well, I will take the Senator's wishes into consideration. This is a very important issue.

Senator **Metzenbaum**. You are not a woman.

Senator **Hatch**. I understand that, I also understand that there are well informed women and men on both sides of this issue. Both will be affected by the ERA. Unfortunately, Congress has never been willing to really examine the arguments these women and men offer to support their opposing views.

This subcommittee has the responsibility to steer the discussion of the ERA away from emotional appeals in order to address some of the important questions raised by those who wish to give this issue the kind of consideration it deserves. After all, it is a proposed constitutional amendment.

Senator **Metzenbaum**. The Chair has been the sponsor of certain constitutional amendments, and in those instances, the Chair did not see fit to urge upon the committees considering those constitutional amendments that there be these lengthy and drawn-out hearings.

Senator **Hatch**. I am not sure that is accurate. For example, on the abortion amendment we had 9 days of hearings and accommodated nearly 80 witnesses. These are important amendments that deserve careful attention. I do not think anyone has ever accused me of delaying these matters.

Senator **Metzenbaum**. It is the perception I am concerned about.

Senator **Hatch**. Then let us perceive what is going on the House. I have said from the beginning that the extent of this subcommittee's hearings will, in considerable measure, be determined by how this matter is treated there. It has become obvious that if the ERA is to receive full and balanced consideration, it will have to be in the Senate.

We are not dragging our feet. We are trying to look at this as carefully as we can within the confines of all our schedules. Senator, we will do the best we can, but I doubt seriously if it will get to the floor before we go out this year.

Senator Grassley.

Senator **Grassley**. Mr. Chairman, I have no opening statement.

Senator **Hatch**. Senator Packwood, we welcome you before our committee. My regard for you is very high, not only as an individual but as someone who has spoken to these issues in a very strong and articulate way. We are happy to take your testimony at this time.

STATEMENT OF HON. BOB PACKWOOD, A U.S. SENATOR FROM THE STATE OF OREGON

Senator **Packwood**. Mr. Chairman, thank you.

Mr. Chairman, let me thank you and the members of this subcommittee for holding this series of hearings on the proposed equal rights amendment and for inviting me to testify this morning. I am extremely proud to testify in support of this amendment, adding my voice for equal rights for all Americans.

Mr. Chairman and Senator Grassley, when enacted, the Constitution in 1787 and the Bill of Rights in 1791 extended their full protections only to white males over 21 who owned real property. The history of expansion of liberty in this country from that time to now, with a few exceptions, has not been the creation of new liberties so much as the extension of existing liberties to classes of people previously uncovered: Blacks, defendants in criminal trials, indigents, children, the insane, aliens, and women. Sometimes, the extention was by constitutional amendment, like the 14th amendment. Sometimes the extension was by court decision such as *Brown* v. *The Board of Education* involving segregation of blacks in education, *Gideon* v. *Wainwright* involving indigent defendants, and *Miranda* v. *Arizona* involving defendants' rights in criminal trials.

However, the Court has not, to this day, extended full protection to women. If the Court had, we might not be here today arguing the equal rights *amendment*.

So the questions to ask ourselves today are as follows:

First, do we want women to have equal rights in this country? I think yes. For those who think no, however, and there are some, we need not ask any other questions.

Second, if, however, you answer, Yes, if you think that women should have equal rights, then the next questions is this: Should those rights be guaranteed at the State or the Federal level? The question, however, answers itself. You cannot have equal rights for women if those rights are disparate and can vary from State to State. If you are going to have equal rights, uniform equal rights throughout the Nation, they must be federally guaranteed and federally protected.

Third, assuming, therefore, that you support equal rights for women and realize that such rights, if they are to be truly equal, can only be guaranteed by uniform Federal action, then the last questions to ask are whether a Federal statute is adequate or whether a constitutional amendment is necessary.

Clearly, a statute is inferior to a constitutional amendment as a guarantor of equal rights. A statute does not rise to the dignity or certainty of the constitution. A statute will be reviewed by any court with less awe than is the Constitution. And, of course, a statute can be repealed by a majority vote of Congress at any time. Clearly, therefore, only a constitutional amendment will guarantee equal rights for women in this country.

Assuming, therefore, that this committee comes to the conclusion that it believes we have arrived at a time in our history when women at last are to be guaranteed equal rights and assuming this committee believes that equal rights for women can only be guaranteed by Federal action, then all this committee need do is to send to the floor Senate Joint Resolution 10 which is before it.

Mr. Chairman, I cannot accept the premise that we do not need an equal rights amendment. A Nation founded on the ideals of freedom of opportunity for all of its citizens cannot continue to deny equality of rights to more than 50 percent of its population. To say that equality can be achieved through statute is like saying that the first amendment is not needed to protect free speech. Equality if a fundamental right. Its guarantee is constitutional protection.

There can be no doubt that women's roles in our society have changed dramatically, especially in the last decade. Although many factors have brought about that change, the resultant effect on our society is significant. It is estimated that soon nearly half of the Nation's workforce will be women: two wage-earner families predominate; childbearing is being postponed; divorce is on the rise; female-headed households have increased dramatically. More and more women are in search and in need of the same opportunities and rights available to men—and they are proving that they can obtain them. But the battle should not have to be so piecemeal nor so hard. Every step forward should not be matched or annulled with a step backward. Victories should not have to be won at the cost of years and years of litigation and lobbying. Incursions into male bastions should not be met by sneers and contempt. Although, Mr. Chairman, no law can change attitudes overnight, the law presently does not even give women a fighting chance. And, although law cannot change attitudes overnight, it can change actions very soon, and attitudes will often follow actions.

We need the equal rights amendment to guide the courts in deciding cases of gender discrimination, to focus the legislatures as we fine-tune implementing legislation and to signal to our Nation and to the world that America will not tolerate second-class citizenry and is doing something about it.

The equal rights amendment will clearly accomplish several crucial objectives. It will strike down sex-based laws and regulations restraining women from achieving equality. Once the equal rights amendment is passed, subsequent laws and regulations will be based on a person's individual characteristics and abilities. Only a Federal equal rights amendment will ensure that these fundamental equalities are both extended to the entire Nation and made invulnerable to executive or congressional action.

The need for and the benefit of the equal rights amendment should be obvious to everyone. It is the most powerful tool for securing equal pay and equal opportunity for women in the workplace. It would ensure that women receive equal treatment in hiring, promotions, salaries, and benefits to their male counterparts.

Instructively, State equal rights amendments have stimulated extensive reform in this area by striking down overly restrictive "protective" and other sex-stereotyped labor laws that serve only to limit employment opportunities for women. The experience with State equal rights amendments has proven that a Federal equal rights amendment would ensure close scrutiny of job requirements unnecessary for job performance, serving only to deny women equal access to these positions.

The equal rights amendment would strengthen the position of women seeking income, health and retirement protection by prohibiting sex-based discrimination in insurance, pensions and retirement security programs that involve government action. Presently, insurance companies justify higher premiums and lower pensions for women by using sex-based actuarial statistics. I have argued time and again in seeking passage of the Fair Insurance Practices Act that insurance rates and pension premiums must be based on individual characteristics. The equal rights amendment would insure such consideration for women in rating all insurance and pension standards touched by it.

Significantly, the equal rights amendment will be beneficial to families and homemakers. The equal rights amendment will help give recognition to the value of homemakers' services within the home. The equal rights amendment will also bolster the effort to secure legal and economic rights for homemakers both during the marriage and in the event of divorce by guaranteeing that marriage is viewed as a legal partnership.

Under the equal rights amendment, the needs, abilities and contributions of each family member, rather than antiquated rules based upon sex-stereotypes, will form the basis for laws governing child support, marital property, and spousal support.

Let me take the lead on the question of today's hearings—the military. Questions surrounding the equal rights amendment's impact on women and the military can best be answered with the same emphasis on individualism that buttresses the equal rights amendment. Military positions, like other job positions, should be filled by the most qualified individuals available, and military assignments should be based on the accurate assessment of job duties and relevant qualifications.

No constitutional amendment can possibly foresee every situation that may arise any more than the framers foresaw the advent of electronic media in drafting the first amendment or the ramifications of the Commerce clause when that clause was put in the Constitution. Therefore, Mr. Chairman, I have only highlighted a few of the many benefits that will be afforded to women, as well as to men, if the equal rights amendment is ratified as part of our Constitution. Regardless of these, opponents will argue that the equal rights amendment is not needed. Instead, they blind themselves to the importance of this measure by shrouding it in myth.

For example, many fear that the equal rights amendment will compel military commanders to assign women to combat positions, even if they are not qualified. As I have stated before, Mr. Chairman, the equal rights amendment will ensure that combat positions are filled by only the most qualified individuals for the job, whether male or female. Another myth is that the equal rights amendment would worsen the situation in this country with respect to "abortion on demand." The equal rights amendment will not affect the availability of abortions. This right is already guaranteed by other constitutional protections. Further, many fear that the equal rights amendment will eliminate or force the integration of single sex private schools, clubs, or other private institutions such as fraternities and sororities. The equal rights amendment will not affect completely private institutions where no State action is involved.

Because of these and other myths, opponents contend that sex discrimination should be corrected by statute, if at all. Mr. Chairman, that simply is not enough. It is too limited. It is too late. It will not help the courts or the country. Although we may fine-tune the masterwork, the equal rights amendment, with legislation from time to time, we cannot make grand music with fine-tuning alone.

Equality of rights is too precious to be subject to shifting attitudes and interpretation and an occasional statute 200 years into the mission, the time is now to ensure the principle for all Americans.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator Packwood, for your outstanding testimony. I appreciate it.

Senator DeConcini, do you have any questions?

Senator DECONCINI. Mr. Chairman, I will have to submit questions at a later time because I have to go to a Rules Committee meeting for about an hour. I want to compliment the Senator from Oregon for expressing his views as he has, particularly, as the ERA impacts on the military.

There are so many volumes of information on the ERA taken from past hearings, both in the Senate and the House, that I have had a chance to review just this last weekend. I have also reviewed the fine book of Senator Hatch, which I do not agree with, but, indeed, I have finally taken the time to read. I want to stress my agreement with the Senator from Oregon that in his opinion combat assignment will not be based on the gender of the troop. It will be based on the need of the commander.

Isn't that your opinion, Senator Packwood, that that, as is the case today, the commander may choose the necessary personnel and place them in the best position for the particular mission that that commander is charged with?

Senator PACKWOOD. It is, to the extent that the commander is given any freedom in that choice. We have some very severe limitations on women in so-called combat today, although that definition is a very broad definition.

Absent that, however, the commander is not free to say I want Sally and Joan and Dianne because they are the best out of the 10 I have. Sometimes he cannot send those three, but short of that, he tries to pick the best people. This amendment will say to him, captain, major, you pick the best 10 you have, regardless of sex.

Senator DECONCINI. And that means that if, in fact, the mission entails physical strength or something that a female might not have, the era would certainly not mandate, as the opponents of the ERA indicate, that women would be allowed into combat because of this amendment.

Senator PACKWOOD. It is the other way around. It is going to be based on individual characteristics, and any commander that tried by some kind of quota system to send half women and half men in, when the women were not fit by physical characteristics, ought to be subject to being cashiered. I want that commander to pick the best people that he or she has under them.

Senator DECONCINI. There is certainly no legal precedent that would indicate that a possible interpretation of this amendment would be that the Constitution would mandate that the commander equalize the mix of sexes in a combat situation.

Senator PACKWOOD. Absolutely not.

Senator DECONCINI. Just as there is not today.

Senator PACKWOOD. There is none in race today.

Senator DECONCINI. I thank the Senator. I have no further questions at this time.

Senator HATCH. Thank you, Senator DeConcini.

Senator Grassley?

Senator GRASSLEY. You made clear what impact you think the ERA would have on abortion. You said it would have none because that is already a constitutional right guaranteed by the Constitution.

But what would it do to the Federal funding of abortions?

Senator PACKWOOD. In my judgment, Senator Grassley, I do not think it would do anything to compel Federal funding unless you come under the "unique physical characteristics" test and I am not sure how a court would come out on that.

My judgment is that the courts would follow the recent Supreme Court case and say that they cannot compel Congress to fund things it does not want to fund. It would be another thing if Congress funded abortions and did not do it equally. But I do not think under the recent Supreme Court decision even the equal rights amendment would have the practical effect of compelling Congress to fund abortion, since the analysis falls so rigidly under the constitutional right to privacy.

Senator Hatch. Senator Kennedy?

Senator Kennedy. Thank you, Mr. Chairman. I would like to have my opening statement included in an appropriate place in the record.

Senator Hatch. Without objection we will place it in the record.

[Prepared statement follows:]

OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY

I welcome this hearing on the effect of the Equal Rights Amendment on the U.S. Armed Forces. Let me state at the outset that I am both a strong supporter of our national defense, and a strong supporter of ERA. And Mr. Chairman, I would not support a Constitutional Amendment that would compromise our military readiness. ERA and national defense are not mutually exclusive; they are mutually compatible.

A useful starting point for the examination of ERA and the military is the basic purpose of ERA, which is to guarantee equality of rights under the law to men and women. To those who would exempt the military from the application of ERA, I say that they miss the point of the amendment. You can't accomplish equality of rights by sanctioning sex discrimination in the military, which employs more than two million Americans, and provides its soldiers with skills and benefits that last a lifetime. So an amendment to the ERA which excludes the military is unacceptable. Those who support such an amendment are opponents of ERA and equal rights, notwithstanding their attempts to otherwise characterize themselves.

Let us look at the arguments made by opponents of equal rights in support of the continuation of sex discrimination in the military: first, that the exclusion of women from involuntary military service and all combat positions is a protection of women which should be retained; and second, that the opening of all military positions to qualified individuals, regardless of sex, would impair our military readiness.

The current quotas on female soldiers and combat exclusions do not protect women from injury or death in the military. Women as nurses and other combat support personnel have served in the combat theater of every war since World War I. Female soldiers in non-combat positions have been wounded, killed, and taken as prisoners in past wars. The Army acknowledges that under current Army policy, in any future war, female soldiers will serve in battlefield areas, be expected to defend themselves and their units, and be exposed to the same risks of injury, death, and capture as their male counterparts.

And the current all-volunteer force does not protect women from a future draft. The Department of Defense has already developed a plan for a draft of medical personnel that would include men and women. So the argument that women currently are protected from the realities of war is simply inaccurate.

Opponents of ERA who claim that sex discrimination in our Armed Forces is essential to our national defense are either seriously misinformed or deliberately attempting to erode support for ERA by misrepresenting its effects. ERA will require gender neutral criteria to be used in recruiting, drafting, and assigning military personnel. ERA will not require that anyone, male or female, be assigned to a position in the military for which he or she is not qualified. Under ERA, military readiness will continue to be the paramount concern of our Armed Forces.

I hope that we will put to rest today once and for all, the specious claims concerning ERA and the military which have been raised by opponents of equal rights in an effort to obscure the real issue of sex discrimination in the military, which is that women are exposed to all of the dangers of military life, but are denied many of the benefits. We will not tolerate this any longer.

I look forward to hearing from our distinguished witnesses on the subject of ERA and the military. And I am hopeful that this important Constitutional amendment will be acted on soon by the Senate Judiciary Committee and the full Senate.

Senator Kennedy. I want to welcome Senator Packwood and say that I think in his statement that he has knocked down a lot of the strawpersons that have been put into the way of this amendment, and I think in his response on this issue of the military, which is the subject of this hearing, he has given us a very clear indication as to what he believes would be the standard that would be used under the ERA, and I agree with him. Individuals would be assigned to the military on the basis of their qualifications.

I suppose what would be reasonable to examine is whether the qualifications which are established in the military for a particular job category are fair and reasonable, and related to the job.

Senator PACKWOOD. The same thing we try to do in the private employment market now. The Court has said on several cases that the standard has to bear some relation to the job, and that you cannot exclude people by an artificial standard that is really unrelated to the job.

Senator KENNEDY. I think that there are many who believe that this may be a factor strengthening the Armed Forces.

Senator PACKWOOD. Well——

Senator KENNEDY. Strengthening the Armed Forces in terms of establishing qualifications for each particular mission. So the ERA may be helpful actually in insuring that we are using the best qualified people to meet the challenges that are ahead.

I understand further if you are looking for the issue of qualifications, you would have to probably look at the reasonableness of the qualifications for a particular kind of a role.

We have seen, for example, when women were brought into the fire departments and police departments, that initially there were qualifications or standards that were established which were really unrelated to the particular skill needed for firefighting or police work, and once the qualifications were really related to the particular responsibility, that women participated, and met the standards and that the various departments have had a very extraordinary record of success. Would it be your understanding that under ERA job-related qualifications in the military could stand?

Senator PACKWOOD. I do not think any of us advocating the equal rights amendment are going to quarrel with fair qualifications. For example, there are maximum-height qualification on fighter pilots. If you are too big you cannot fit into the cockpit, and that applies both to men and women if they are too tall, and I think also too fat.

Senator KENNEDY. I just want to end with this. Do you not believe that many of the reasons which are raised for involving or not involving women in the Armed Forces are similar to the arguments that were raised a number of years ago to exclude blacks and other minorities in the Armed Forces?

Senator PACKWOOD. Absolutely, yes.

Senator KENNEDY. The same issues were raised that we are not going to be able to keep up the morale, that we cannot expect to have a good effective fighting force, that to maintain combat efficiency, we have to have separate units.

I think many of us remember the action that was taken by a President to move toward eliminating those criteria and standards a number of years ago with respect to race, but it seems to me that I hear the same kind of echo at the present time when we are talking about women in the Armed Forces that we heard probably 30 years ago concerning racial minorities.

And I am just wondering as someone who follows this issue and has given some thought to it what your views are on this issue.

Senator Packwood. It is amazing to me how rapidly things have changed. I am going to go back to 1970 and raise the four questions that Senator Ervin raised in opposition to the equal rights amendment and its effect upon the military at that time:

First. Would women have to be admitted to the service academies?

Second. Would separate women's corps such as the WAC's have to be abolished?

Third. Would women and men end up in basic training together?

Fourth. Would women be required to perform jobs in combat zones?

Even though we have not had an equal rights amendment, women are admitted to the service academies. They are doing very well. They graduate high in the class. They are performing excellently.

Would separate women's corps such as the WAC's have to be abolished? They abolished a long time ago. Would men and women end up in basic training together? The answer is yes, and they are now.

Would women be required to perform jobs in combat zones? Does Senator Ervin mean required regardless of qualifications? I think he phrases it in the wrong sense. All of these issues that just 13 years ago were raised as myths and horror stories have all come to pass and our military can still give a good account of itself, and we have not even got the equal rights amendment.

Senator Kennedy. Well, the time is moving on. I do not know whether you have seen that Army report, the REF WAC report. I will get into that later on perhaps with some of the other witnesses. It is an evaluation of the performance of women in units with men on extended field exercises. I think the results of it were enormously important and impressive. I will develop that perhaps later.

Senator Packwood. You mentioned the issue of race. History does change. Within the last century and a half, England still had what they called "Test Acts," where Catholics and Jews were not allowed to serve in the military. Whether they were regarded as untrustworthy or loyal to the Pope or loyal to somebody else, England's laws did not allow them in the military. Times have changed. England has now had many, many, many extraordinary Catholic and Jewish members of the military.

Society does change. Society has changed. By gosh, nowhere is this more evident then when you talk about physical qualifications. We all have sports that we play. Mine happens to be squash.

I have an old friend in Oregon, a women, who is 56 years old. She took up squash at the age of 50. I have played it off and on since I was in my midtwenties. She regularly beats me at squash, and I mean handsomely beats me at squash.

I play over here at the local club and took a lesson one day from their woman professional, and after she had beaten me a game or two 15-6 or 15-7, she put her racket up against the wall and she said, "Now, Senator, I want you to bounce the ball on the ground and hit the racket." Well, I bounced it 10 times and missed the racket 10 times. She then took my racket and hit her racket 7 times out of 10.

Now, if that ability is anything akin to shooting a rifle, I want her with me—[laughter]—if I have to be on combat.

Senator Kennedy. You've convinced me, Senator. Thank you very much.

Senator DeConcini. Would the Chairman yield?

Senator Hatch. Yes, go ahead.

Senator DeConcini. Mr. Chairman, I have an opening statement. I would like to have it appear.

Senator Hatch. Without objection, we will place it in the record.

[Prepared statement follows:]

Opening Statement of Senator Dennis DeConcini

It is a pleasure for me to welcome our distinguished witnesses to the hearing today on the impact of the ERA on the military. You both have outstanding credentials and I look forward to hearing from you.

In considering the ERA, its impact on the military is always certain to begin a lively discussion. As a Member of the Senate it has been my privilege to tour numerous military installations and to observe first hand the role that women play in our national defense. By and large, the reports I have seen and the commanders I have spoken to about the performance of women in the military, have indicated that women pull their weight and serve a vital function in the armed services.

Thus far in the Nation's history, we have not had to call upon our women to service in combat units although many women have served with distinction in combat areas. The key question that I believe will evolve today is whether the ERA will mandate the opportunity for women to serve in a combate role and what restriction, if any, will the Congress or the President be able to place on their service?

I look forward to a thorough discussion of the issue. I firmly believe that the ERA will not have a negative impact on the ability of Congress to provide for military necessity and the national security while at the same time providing women with all the rights they have earned.

Senator Hatch. Bob, you indicated to Senator Grassley that you see no relationship between the ERA and abortion funding. Do you feel that ERA will enhance abortion rights in any of those areas in which they are still not fully realized?

Senator Packwood. Give me some examples and let me answer them.

Senator Hatch. Do you think the right to have the Government pay for an abortion will be enhanced?

Senator Packwood. Mr. Chairman, I do not think so as a practical matter. Again, I do not want to be like James Madison trying to guess the commerce clause, but I think the Court was very clear in its recent case that it cannot compel Congress to appropriate money.

Senator Hatch. Keep in mind that *Harris* v. *McRae* was a 5-to-4 decision.

Senator Packwood. I understand that.

Senator Hatch. Almost every feminist organization in the country fought against the ban.

Senator Packwood. I understand that.

Senator Hatch. Would the ERA push that result over the other way?

Senator Packwood. I was familiar with the case in the district court when the district court held that Congress did have to appropriate the money, and then the Supreme Court reversed it.

Senator Hatch. Right.

Senator PACKWOOD. Again, Mr. Chairman, we cannot guess what a court will do. They reversed themselves on "separate but equal." They reversed themselves on the issuing reapportionment after a century and a half of saying it was a political thicket that they would not get into.

I am not going to try to duck issues. I do not think the ERA in and of itself would, as a practical matter, lead to abortion funding, but far be it from me to say what a court might do.

Senator HATCH. Given that concern that you are not sure what the court will do, would you object to adding language to the ERA that makes clear that nothing in the amendment shall affect abortion rights or abortion funding?

Senator PACKWOOD. No, I would not want to put that in. I do not want to start cluttering up the ERA with specific "but-not," "but-not," "but-not," "but-not" amendments. So I would not.

Senator HATCH. But it is a issue. And some of the more prominent opponents and proponents of abortion have indicated their belief that the passage of the ERA will enhance abortion rights.

During the recent debate on the Hyde amendment you argued that the funding restrictions "fly in the face" of all the progress that this country has made toward "equal rights." Now, that raises some concerns for me.

You mentioned the *Harris* v. *McRae* case. In that case, virtually every major feminist organization in the country argued before the Supreme Court that the Hyde amendment represented a violation of the equal rights, component of the fifth amendment: Now, they were unsuccessful, but it was a 5-to-4 decision.

It could easily go the other way, especially with the proposed ERA in the Constitution.

Abortion rights litigator Rhonda Copelon, whom you quoted extensively during recent debates on abortion, stated in October 1983 in Ms. magazine that "the separation of abortion from the campaign for the ERA has jeopardized abortion and produced a truncated version of liberation."

As you know, abortion rights groups have sought to use the State ERA provisions in Massachusetts and Pennsylvania and Hawaii to promote abortion rights.

Senator PACKWOOD. And what effect have they had on funding in those cases?

Senator HATCH. Thus far, not much. But, there is clearly a genuine controversy here. If the equal rights amendment is passed, will that affect that funding decision? You are saying you do not know. So what objection would you have to putting this in the bill?

Senator PACKWOOD. I do not want to mislead you, Mr. Chairman. What I am saying is I do not think so. I am willing to bet you dollars to doughnuts, however, if the ERA passes that someone will bring a case and argue it on that basis.

Senator HATCH. I think we all know that is going to happen.

Senator PACKWOOD. We are a very litigious country, and I am quite sure that some suit will be brought on that basis.

Senator HATCH. Well, then do we not have an obligation to make clear exactly what this is going to mean?

Senator PACKWOOD. I would not accept any addition to this amendment involving abortion or anything else. I like the amendment the way it is worded. This committee will have to do with it as it wants assuming it is going to send it out.

Senator HATCH. Individuals such as Professor Emerson of Yale's law school who, of course, has written very extensively, in his analysis of the ERA has stated in this article that the ERA would enhance abortion rights.

Do you disagree with that? Or do you say you do not know?

Senator PACKWOOD. No. What I am saying is that I do not think the ERA will, as a practical matter, compel abortion funding. If you want to talk about other abortion rights, you can.

Senator HATCH. Other authorities, such as Professor Emerson of the Yale law school, are saying that the ERA may significantly enhance abortion rights.

Senator PACKWOOD. I understand. I would be very surprised if all witnesses say identical things, whether proponents or opponents of this amendment.

Senator HATCH. What you are saying then, it seems to me, is let us leave it to the courts, and the courts will have to resolve this, and whatever they do will be fine.

Senator PACKWOOD. What I am saying is that I do not want the equal rights amendment cluttered up with abortion or with any other provisons. I like it the way it is written.

Senator HATCH. So the courts will have to decide it then.

Senator PACKWOOD. Courts at the moment have decided on that issue.

Senator HATCH. But when the equal rights amendment is passed, the courts will be the ultimate decisionmakers on that particular issue.

Senator PACKWOOD. They always are.

Senator HATCH. They would not have to be if we wrote the language clearly. We could clarify and resolve that issue right now.

Senator PACKWOOD. That is a decision that this committee will have to make. If it is included, I would try to take it out on the floor.

Senator HATCH. You would prefer not to have it included?

Senator PACKWOOD. Oh, very much.

Senator HATCH. Does any of this suggest to you that opponents of abortion at least have a reasonable concern that there may be a nexus between the ERA and abortion?

Senator PACKWOOD. No, I do not think so. I think it is one more effort to defeat it, but my hunch would be if you put the strongest antiabortion rider on this amendment that you could dream up, it would not change a single antiabortion vote toward the amendment.

Senator HATCH. Well, there are some who are antiabortion who do support the ERA, but are concerned about whether this issue is going to be resolved, whether the ERA will promote abortion rights. It is a legitimate concern.

Senator PACKWOOD. Well, that is a decision you will have to make, but if the committee does add it, I will indicate notice. I will try to take it out with an amendment on the floor.

Senator HATCH. I personally believe that a reasonable person could conclude that there is a relationship between the ERA and abortion rights. That is the point: Reasonable people, I believe, can come to this conclusion. Of course, we cannot prove now who is right or wrong. The only way to resolve it once and for all is to write into the amendment specific language that will prevent the ERA from affecting abortion.

Senator PACKWOOD. Well, as I said, Mr. Chairman, you and I disagree on the abortion issue, but this committee will have to do what it wishes to do, assuming it is going to send out the amendment.

Senator HATCH. What I am trying to do, Senator Packwood, is create legislative history of exactly what this amendment means.

Senator PACKWOOD. As I have indicated to you, I do not think the amendment will compel abortion funding.

Senator HATCH. But you do not know.

Senator PACKWOOD. I do not think anyone testifying can tell you exactly what the courts will decide 50 or 100 years from now any more than, Mr. Chairman, you could have predicted decisions under the due process clause or any of the other major provisions of the Constitution.

Senator HATCH. Well, what would your intent be, then? Is it your intent to enhance abortion rights with the ERA?

Senator PACKWOOD. I would be perfectly happy if we can one day pass legislation funding abortion, and I hope we will. That fight will come again another day, and second, I will be perfectly happy if, apart from funding, no other change is made in the present right of a woman to make the choice for herself as to whether or not to have an abortion.

I do not regard that as a major issue in the equal rights amendment. That right is secured except for funding which I do not think this amendment will touch, and I think the abortion issue is a tactic thrown up in an effort to defeat the ERA.

Senator HATCH. On another issue. When you and Senator Tsongas reintroduced the ERA last year, you said, on the Senate floor, that the ERA was "the most powerful tool" to insure women equal pay and equal opportunities in jobs.

I wonder if you could elaborate on this. Would the ERA require changes in the Federal Equal Pay Act or State equal pay acts?

Senator PACKWOOD. Mr. Chairman, I am going to answer your questions very carefully because I realize we are laying a record.

Senator HATCH. That is right.

[Pause.]

Senator KENNEDY. While we have this hiatus, Mr. Chairman, what is going to be the way that we are going to proceed this morning with the various witnesses?

Senator HATCH. As soon as Senator Packwood is through we will call on Mr. Cohen and Ms. Chayes.

Senator KENNEDY. Just in terms of inquiring of the witnesses, are we going to follow a 10-minute rule or how are we going to proceed? Do you have some idea?

Senator HATCH. We will make sure everybody has the opportunity to ask all the questions they want.

Senator PACKWOOD. Now, would you ask the question again?

Senator HATCH. Yes. Would the equal rights amendment require any changes in the Federal Equal Pay Act or State equal pay acts in this country?

Senator PACKWOOD. Possibly. It depends on how the acts are worded. You know that there will be a 2-year hiatus after ratification before the equal rights amendment goes into effect, and that the experience in the 16 States that have Equal Rights Acts now, although they are not all identical, has been that in this 2-year period, legislative bodies have significantly changed their laws if they were completely out of phase with the State Equal Rights Act. Consequently there have not been as many suits filed as people predicted.

If we had State acts or Federal acts that were not in harmony with the goal of the equal rights amendment, my hunch would be that they would be changed or they probably would be challenged.

Senator HATCH. In your statement, however, you say, on page 10: "The equal rights amendment will not affect completely private institutions where no State action is involved".

Senator PACKWOOD. That is correct, but I am not quite sure what your point is.

Senator HATCH. Well, the equal pay acts only apply to private entities.

Senator PACKWOOD. When we say "private," we are talking about no Government touching. In that case, you are saying that the present Constitution cannot compel private employers, General Motors, cannot compel them to cease discriminating on the base of race, or religion, or national origin. Clearly, that is regarded as a public action, and we have prohibited discrimination in those areas for a good many years.

Senator HATCH. That is under the commerce clause. That is not under the 14th amendment or under the equal rights amendment. Do you agree with that?

Senator PACKWOOD. As far as I am concerned, if the equal rights amendment passes, it would accord to women the same protections we now extend to race, religion, or national origin in those areas.

Senator HATCH. Would the State ERA require changes in title VII of the Equal Employment Opportunity Act or of similar State laws?

Senator PACKWOOD. Say that again.

Senator HATCH. Would the ERA require changes in title VII of the Equal Employment Opportunity Act or similar State laws?

Senator PACKWOOD. No; it does not compel changes.

Senator HATCH. Would the ERA apply to private-sector business enterprises at all?

Senator PACKWOOD. Do you define private action as private employment, for example; the practices of a company like General Motors?

Senator HATCH. Sure.

Senator PACKWOOD. Well, they are already covered at the moment in terms of employment. Now, is your question, would the equal rights amendment require our present Federal act to be changed?

Senator HATCH. No; I am saying, of course, they are covered. But, would the ERA change that coverage in any respect?

Senator PACKWOOD. I am trying to think——

Senator HATCH. See, the ERA only applies to State action.

Senator PACKWOOD. I am trying to think whether it would require a change. Sana, come here.

Senator HATCH. Sana, why do you not sit there?

Senator PACKWOOD. Yes, I am going to have her sit here, Mr. Chairman, because in laying a record, I want to be very sure we lay a record that says exactly what we mean.

Senator HATCH. I want to be sure, too.

Senator KENNEDY. Just like other staff sit next to other Senators. [Laughter.]

Senator HATCH. That is right. Well, she is one of the best staff people on the Hill. And Senator Packwood is one of the best Senators on the Hill.

Senator PACKWOOD. I appreciate the compliment. It is because of good staff.

I do not think, Mr. Chairman, that the equal rights amendment will require changes in any of the Federal employment statutes.

Senator HATCH. Well, then if it does not, why would you say that it will be the "most powerful tool" to ensure women equal pay and equal opportunity?

Senator PACKWOOD. Give me the question again.

Senator HATCH. Well, how would the ERA be the most powerful tool to ensure that women would have equal pay and equal opportunity if it wouldn't affect either the Equal Pay or Equal Employment Opportunity Acts?

Senator PACKWOOD. Because there is no more powerful tool, Mr. Chairman, than the Constitution. No statute is going to come close to that.

Senator HATCH. You are saying by force of the Constitution these things will change automatically?

Senator PACKWOOD. No; the ERA will be a more powerful weapon, but if it does nothing to change the present employment statutes. It simply gives us a stronger hook.

Senator HATCH. Thank you, Senator Packwood, for coming today.

Senator GRASSLEY. Mr. Chairman, I have a question.

Senator HATCH. Senator Grassley.

Senator GRASSLEY. In the several States that have passed ERA's, has the economic position of women improved? I refer specifically to the statistic that women earn about 59 percent of the wages that a man gets.

Senator PACKWOOD. Senator Grassley, I do not have any statistics on that. I am not saying they are unavailable. I simply do not have any. So I cannot answer your question.

Senator GRASSLEY. Does your staff know of any?

Senator PACKWOOD. No. I just asked Sana. We do not have those statistics. I do not know if they are available or not, but I do not have them and Sana does not have them.

Senator HATCH. According to the figures I have, the States that have an ERA are at 57 cents to the dollar; the States that do not have it are at 59 cents.

Senator PACKWOOD. That may or may not be accurate.

Senator HATCH. I do not know that it is accurate either, but it is right out of a NOW report. I don't believe that this is a meaningful statistical comparison in the first place.

Senator PACKWOOD. What I would be curious about is what the relative relation of wages in those States is, rather than comparing them to non-ERA States generally. If those statistics are available, they can be obtained.

Senator HATCH. Thank you, Senator Packwood. We appreciate having you here.

Senator PACKWOOD. Thank you, Mr. Chairman.

Senator KENNEDY. May I?

Senator HATCH. Sure.

Senator KENNEDY. I wish, quite frankly, Senator, that when we do have special or particular questions, it is of value, in terms of making a complete record, that we notify the witnesses beforehand so that there can be an active exchange and a useful record made——

Senator HATCH. Well, there is nothing——

Senator KENNEDY. If I can just continue uninterrupted, Mr. Chairman.

Senator HATCH. Sure.

Senator KENNEDY. Obviously, different people are expert in different areas. I have always felt, not that it is necessarily a pattern, but when we are having, for example, a member of the administration, it is useful to notify them before the hearing of the areas that I am particularly interested in. They may agree. They may differ. But I always find that in terms of both making a record and engaging in what this whole process is about in terms of trying to inform a membership that it does have some value.

I do not expect really a comment on your part on this, but I do feel constrained to make this particular comment.

Now, with regard to the power of the equal rights amendment, and the question that was asked about this issue, I imagine that if we have a passage of ERA and we have the Federal Government, which is a major employer, and we have the State governments that are observing this and following this, that is going to be an extremely powerful force in terms of eliminating some of the discrimination which exists in this country.

I think that that conclusion is not an enormous leap to imagination.

Senator PACKWOOD. I am glad that we are, at last, including Congress in the coverage of this amendment. We have neglected that little tidbit in past actions. I would like to think that the moral suasion of the Federal Government, and the State governments, and the city governments, and the county governments and all of the universities in this country would have some effect on the feelings and the actions of the private sector.

Senator KENNEDY. Not that it is necessarily so or true, but obviously as you have pointed out, it does have some implication. It does have important ramifications, particularly in the areas of employment.

So I find that argument very persuasive. I would hope, Senator, that in terms of making the record, that this record would be open for a reasonable period of time so that on issues of technical nature or other nature that any of the witnesses feel that they want to be able to give a more complete response for they are afforded the same kinds of courtesies which Members of Congress have for themselves when they want to expand on their records.

Senator HATCH. We will keep the record open. We have kept the record open from the first day of hearings for answers to what the distinguished Senator calls technical questions.

I might mention that it is hardly a technical question to ask the extent to which the ERA would apply to the private sector. That goes right to the core issue of the equal rights amendment.

The point is that the ERA does not, according to Senator Packwood, affect the basic equal pay and equal opportunity laws of the country.

Senator PACKWOOD. I think I said it the other way around. I do not think it compels any change in our equal pay laws.

Senator HATCH. OK. Thank you. We appreciate having you here. We appreciate your testimony.

Senator PACKWOOD. Thank you, Mr. Chairman. I am glad to be here.

Senator HATCH. I would like to call our next witness, Prof. Eliot Cohen, who teaches at the Harvard School of Government. Professor Cohen is also the acting director of the national security study group at the Center for International Affairs at Harvard and has written extensively on the subject of military affairs.

Also joining him at the witnesses table will be Ms. Antonia Handler Chayes, a partner in the Boston law firm of Csaplar & Bok. Ms. Chayes served as Under Secretary of the Air Force under President Carter.

I want to welcome both of you before this committee. I might add that you are both Kennedy constituents. So it is important we have the testimony from both of you.

Senator KENNEDY. We are very glad to welcome them here to our committee. If I can indulge the committee for one moment, I have not had a chance to know the professor, though I have read his statement for the hearing today, but Antonia Chayes I have known for a number of years, and she has served the military with great distinction as the Under Secretary of the Air Force, and in other capacities, and has been incredibly involved in a wide variety of civic and charitable undertakings. She is enormously gifted and talented.

I always find out that on military matters, either Antonia Chayes or her husband has the answers. The family is enormously gifted, and talented, and they have served our country very well. We welcome Antonia Chayes here this morning.

Senator HATCH. We are happy to have both of you here.
Professor Cohen.

STATEMENTS OF PROF. ELIOT A. COHEN, PROFESSOR, HARVARD UNIVERSITY, DEPARTMENT OF GOVERNMENT; AND ANTONIA HANDLER CHAYES, PARTNER, LAW FIRM OF CSAPLAR & BOK

Mr. COHEN. Thank you, Senator Hatch.

It is an honor to be asked to testify at these hearings on the likely consequences of the passage of the equal rights amendment. In the remarks that follow, I shall focus on the likely effects the equal rights amendment would have on the ability of our Armed

Forces to perform their wartime missions. I may sum up my argument in the following set of propositions:

First: ERA would require the imposition of sex-blind criteria throughout the military. In particular, it would require the abolition of the combat exclusion policy. It would send women in large numbers into combat.

Second. This step would be one without precedent in our history. Today, the American people remain strongly opposed to sending women into combat.

Third: No other nation has adopted in peacetime policies which would send women into combat on the scale which ERA would force upon us. Indeed, very few States have sent female soldiers into combat and none have persisted in the practice.

Fourth: There are many and strong reasons to think that a policy that would force us to send women into combat would sap the fighting effectiveness of our military forces. In the event of war, it would needlessly cost young men and young women their lives.

I will treat each of these propositions separately. Limitations of time preclude a discussion of other aspects of how ERA would affect the military—in the matter of pregnancy, for example, or personnel turnover—but I shall gladly address these later, if you wish.

Proposition No. 1. ERA means the end of combat exclusion.

There is little dispute that ERA would lead to mandatory draft registration of women as well as men, and in the event of the resumption of the draft, application of conscription to both sexes. Such has been the view of virtually all proponents of the equal rights amendment. On the matter of combat exclusion, however, there has been somewhat more dispute.

The combat exclusion policy varies from service to service. In the Navy and Air Force, it rests on legislation. In the Army, it depends on a regulation which states that women are not authorized to serve in certain types of units, for example, infantry, cannon artillery, armor, combat engineers, low altitude air defense and on helicopters. Combat exclusion also closes certain military occupational specialties or MOS's to women. It closes other specialties because of the high likelihood they have of indirectly forcing women to engage in combat. If Congress wished, it could abolish any combat exclusion policy now: It has, however, chosen not to do so.

There are overwhelming grounds to think that ERA would force the Armed Forces to jettison all gender-based distinctions, including the combat exclusion policy. When ERA first passed the Senate in 1972, Senator Sam Ervin attempted to add to it a stipulation excluding women from combat. That effort was defeated by a vote of 71 to 18. An amendment to exclude women from the draft was defeated by a similar margin. These votes seem to suggest that the Yale Law Journal article, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," is correct in holding that, "Women will serve in all kinds of units and they will be eligible for combat duty".

Other statements by authoritative supports of the equal rights amendment including Ms. Chayes can be brought in support of this view. More to the point, however, is the argument raised by Prof.

Jeremy Rabkin of Cornell University and, indeed, again by Ms. Chayes. ERA would set discrimination on the basis of sex on the same level as discrimination on the basis of race. It would make the former as utterly illegitimate as the latter is today. Since this is the case, no military policy based on sexual differences would be maintained, particularly combat exclusion.

Proposition No. 2. This step would be unacceptable to the American people

As it is, the percentage of women in the Armed Forces today, about 9 percent, is far higher than it was during the height of World War II, when hundreds of thousands of women volunteered for various types of military service. This has come about in large part because of the desire of successive administratives to maintain a 2 million man force without a draft. Nonetheless, as we all know, mandatory male draft registration was reintroduced under the Carter administration and has been continued until the present. Various attempts were made in Congress and the courts to require that women as well as men register for the draft. As Gallup polls have continuously demonstrated, however, most Americans, though favoring draft registration, and even by a narrow margin reinstitution of the draft, oppose registration of women. One poll, conducted in the summer of 1981, revealed that 59 percent of those surveyed said that they approved the Supreme Court ruling that women cannot be drafted. Only 36 percent disapproved of this admittedly somewhat distortion of the Supreme Court's holding.

More significantly, however, crushing majorities have always opposed the notion that women should be eligible for combat duty let alone required to participate in it. In a March 1980 Gallup poll, only 21 percent of the population surveyed thought that women should be eligible for combat roles if any kind of draft were required. The wording of the survey question implied that women would not necessarily be obliged to serve in combat but rather be allowed to volunteer to do so. In other words, this meager percentage does not even reflect the true import of an abolition of the combat exclusion policy which would require female draftees to participate in combat. Never, to my knowledge, has much more than one-third of the American public ever supported the notion of women participating in combat in any way. I would also note parenthetically that larger percentages of women opposed female conscription than do men. In the 1981 poll to which I just referred, 64 percent of all women as opposed to 53 percent of all men opposed the conscription of women.

Proposition No. 3. The proposed abolition of combat exclusion is without precedent.

Only in the most extreme emergency—when a nation has already suffered terrible human losses, when the homeland has been invaded and when the threat of national extension is at hand—do we find large-scale conscription of women for combat. The Russians drafted large numbers of women during World War II, sending some, by no means all, and probably not even most, to the front where they do not seem to have made a powerful impression on their German enemies. After the war the Soviets stopped drafting women, and today the Soviet Army has scarcely any female soldiers. Although Soviet women have long participated in a host of activities untraditional in Western eyes, industrial labor, for example, or even medicine, the Soviet military leadership has refrained from incorporating them into the standing forces of the Soviet state.

The case of Israel, a democratic state with, if anything, a more egalitarian heritage than our own, is even more to the point. From the founding of the first Jewish settlements at the beginning of the century through the 1948 Israeli War of Independence, women did serve in the underground Jewish militia. For a brief time, combat units of the Israel Defense Forces did contain men and women. By the end of the 1948 war, however, when the acute manpower and strategic crisis of the opening stages had been overcome, women returned to vital but nonetheless noncombat roles.

Today, Israel drafts on the order of 50 percent of its women for a 2-year tour of duty. These conscripts serve in the equivalent of our old Women's Army Corps, the Cheyl Nashim. Although trained in basic weapons handling, they do not serve in combat units and are carefully excluded from front line positions. Indeed, the Israel Defense Forces made considerable efforts at the beginning of the 1973 war to evacuate as many women as possible from exposed bases in the Sinai in order to lessen their exposure to combat. Women do not, as in the American Army, have military specialties which are likely to place them on the frontlines, even if they are not combat specialties per se.

We thus have two countries which have had considerable experience with women in combat which maintain large and effective military establishments and which adhere to ideologies sympathetic to the use of women in combat. Neither sends women into combat today nor does either seem to have serious plans to do so in the future. In view of these facts, it is evident that an American decision to sweep away all gender barriers in the Armed Forces would constitute an experiment in military organization of unprecedent proportions.

Proposition No 4. An end to combat exclusion would damage military effectiveness.

Military organizations have functions and requirements utterly different from those of civil organizations such as businesses, educational institutions, or government bureaucracies. In the words of the greatest student of war:

> War is a special activity, different and separate from any other pursued by man. . . . No matter how clearly we see the citizen and the soldier in the same man, how strongly we conceive of war as the business of the entire nation, the business of war will always remain individual and distinct.

We must not judge military organizations by the standards we apply to their civilian counterparts, for the task of military organizations is incomparably the more difficult. That task is to prepare men to suffer and endure and to inflict yet greater suffering and privation on an enemy. War calls forth from those who participate in it levels of physical and emotional exertion quite unparalleled in the civilian realm, and for its successful conduct requires group cohesion and morale equally extraordinary. It is clear that women can serve and do serve successfully at all levels of employment in the American business corporation, university or governmental bureaucracy. Such, however, cannot be the case for the Armed Forces.

As numerous students of combat, including historians such as Gen. S.L.A. Marshall, and sociologists, such as Edward Shils and Morris Janowitz, have observed, military effectiveness rests primarily on the cohesiveness of small groups of soldiers. The relationships among these small groups, be they in a rifle squad, a team of combat engineers, or a gun crew, take on enormous importance for those who belong to them. In the final analysis, soldiers keep their courage in the midst of danger not because they make realistic estimates of their predicament and not even out of a sense of patriotism. Rather, they overcome their fear because of their sense of brotherhood with those about them, their fear of letting down their buddies on the one hand and their desire to serve and protect them on the other.

This phenomenon, known in the jargon of social psychology as male bonding and particularly well depicted in movies, such as "The Deerhunter" or "The Big Red One," is crucial to military effectiveness. It is profoundly threatened by the intervention of disturbing factors such as romantic or sexual attachments of jealousies. In the conditions of campaigning, conditions of prolonged physical misery and psychological stress, nothing is more important for the success, indeed, the survival of an army than the cohesiveness of its small groups. This is the quality that gave the outnumbered and in some respects the outgunned British commandos and paratroops their victory over superior numbers of dug-in Argentine soldiers in the Falklands last year. This is the quality that allows the Israelis to hold at bay forces many times their number. This is the quality that all good armies everywhere seek to create and maintain.

What motivates men to fight? In a recent article favoring the use of women in combatant units the author admits the following:

> Let me offer an additional explanation for men's resistence to allowing women in combat units. I conjecture that there is a psychological differentiation between the real world and combat than enables some men to survive the enormous psychological stress of combat. One survives by preserving a mental picture of the normal world back home to which one will return from the horror world of combat. One is engaged in an elaborate game, albeit one with very high stakes, and when the game is over, one can go home to an intact world. One of the major components of the world back home is women, "our women", who are warm, nuturant and ultra-feminine. Woman, at least "our women," are not part of war. Indeed, one of the reasons for fighting is to protect our women and the rest of what is in the image of the world back home. If we allow these women into combat with us, then this psychological differentiation cannot be maintained and we lose this psychological defense.

I hasten to repeat that is not from an article opposed to including women in combat. That is from an article in favor of introducing women into combat.

Senator Hatch. That article is by Mady Wechsler Segal, "The Argument for Female Combatants"?

Mr. Cohen. Yes, that is the Segal article from Female Soldiers—"Combatants or Noncombatants?" which is perhaps one of the best studies of this issue.

Senator Hatch. That is 1982.

Mr. Cohen. Yes. And I cannot stress enough that that is from an article favoring the introduction of women into combat.

After having said that, the author lamely concludes: "If these speculations are accurate, I do not know precisely what effect women in combat would have on combat unit cohension." These are not, however, mere speculations but rather a statement of sociological fact, confirmed by empirical studies of soldiers' morale, studies which I have footenoted in my testimony.

Military organizations make conscious use of masculinity, appeals to it and, indeed, at times exaggerations of it. We observe this in the marching cadences of a platoon of troops, the psychological and physical challenges of basic training, indeed the everyday language of sergeants talking to young privates. It occasionally strikes us as tasteless or vulgar, and in the civilian world it would certainly be inappropriate, but it performs an invaluable service in welding groups of young men into units of proud, aggressive, and competent soldiers.

I would like to insert at this point an observation. I do not like to correct Senator Packwood, but he is not correct in saying that women and men currently undergo basic training together.

The Army did experiment with that, and it was a failure. The Army now has returned to basic training that is sex segregated.

The question of physical capacities, therefore, though an extremely important one, is in some respects besides the point. There are, no doubt, a few women capable of marching 20 miles a day with an 80-pound rucksack, manhandling an antitank missile or hauling the body of a wounded comrade to safety. The wholesale incorporation of women into units of all kinds, however, will rip the fabric of cohesion at a number of points, and in combat, that can mean the difference between life and death.

I hasten to add that many uniformed women have, in the past, and will continue in the future to play an honorable and useful, indeed, a vital role in our Nation's defense. This has been the experience of our country and others in much more dire straits, such as Isreal. There are many military positions for which women are as well or perhaps on average even better qualified than men. But it is, I believe, clear that many military jobs should be confined to men, that women should be incorporated into military units only with the greatest of care and that the equal rights amendments abolition of gender-based criteria in the Armed Forces would be an unmitigated disaster.

Throughout these hearings you have heard or will hear how the equal rights amendment will affect the legal and financial status of various institutions. Many of the consequences will be serious, but there will be those who will consider the cost or inconvenience inflicted worth the goal of complete sexual equality. Similarly, in the military realm the price of the equal rights amendment will include the expense of cumbersome draft procedures, the personnel turbulance caused by pregnant soldiers or the inconvenience of measures to preserve privacy in the field. But here the price of the equal rights amendment will encompass an infinitely greater cost, that most precious of all commodities, the lives of young men and women.

[The prepared statement of Mr. Cohen follows:]

PREPARED STATEMENT OF ELIOT A. COHEN

It is an honor to be asked to testify at these hearings on the likely consequences of the passage of the Equal Rights Amendment. In the remarks that follow I shall focus exclusively on the likely effects ERA would have on the ability of our armed forces to perform their wartime missions. I may sum up my argument in the following set of propositions:

(1) ERA would require the imposition of sex-blind criteria throughout the military: in particular, it would require the abolition of the combat exclusion policy. It would send women en masse into combat.

(2) This step would be one without precedent in our history; today, the American people remain strongly opposed to sending women into combat.

(3) No other nation has adopted in peacetime policies which would send women into combat on the scale which ERA would force upon us. Indeed, very few states have ever sent female soldiers into combat, and none have persisted in the practice.

(4) There are many and strong reasons to think that a policy which would force us to send women into combat would sap the fighting effectiveness of our military forces: in the event of war it would needlessly cost young men and women their lives.

I will treat each of these propositions separately. Limitations of time preclude a discussion of other aspects of how ERA would affect the military — in the matter of pregnancy, for example, or personnel turnover — but I shall gladly address these issues later, if you wish.

Proposition #1: ERA Means the End of Combat Exclusion

There is little dispute that ERA would lead to mandatory draft registration of women as well as men, and, in the event of a resumption of the draft, application of conscription to both sexes. Such has been the view of virtually all proponents of ERA. On the matter of combat exclusion, however, there has been somewhat more dispute.

The combat exclusion policy varies from service to service. In the Navy and Air Force it rests on legislation: in the Army it depends on a regulation which states that women are not authorized to serve in certain types of units (i.e. infantry, cannon artillery, armor, combat engineer, low altitude air defense, and on helicopters). Combat exclusion closes certain military occupational specialties or MOS's (those listed above) to women; it also closes other specialties because of the high likelihood they have of indirectly forcing women to engage in combat. If Congress wished it could abolish any combat exclusion policy now: it has chosen not to do so.

There are overwhelming grounds to think that ERA would force the armed forces to jettison all gender-based distinctions, including the combat exclusion policy. When ERA first passed the Senate in 1972 Senator Sam Ervin attempted to add to it a stipulation excluding women from combat. That effort was defeated by a vote of 71 to 18: an amendment to exclude women from the draft was defeated by a similar margin. These votes seem to suggest that the *Yale Law Journal* article, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," is correct in holding that "Women will serve in all kinds of units and they will be eligible for combat duty."[1]

Other statements by authoritative supporters of ERA can be brought in support of this view. More to the point, however, is the argument raised by Professor Jeremy Rabkin of Cornell University: ERA would set discrimination on the basis of sex on the same level as discrimination on the basis of race — it would make the former as utterly illegitimate as the latter is today. If this is the case, and I believe that it is, then no military policy based on sexual differences could be maintained, particularly combat exclusion.

Proposition #2. This Step Would Be Unacceptable to the American People

As it is, the percentage of women in the armed forces today (about 9 percent) is far higher than it was even during the height of World War II, when hundreds of thousands of women volunteered for various types of military service. This has come about in large part because of a desire on the part of successive Administrations to maintain a two million man force without a draft.

Nonetheless, as we all know, mandatory male draft registration was reintroduced under the Carter Administration and has been continued until the present. Various attempts were made in Congress and the courts to require that women as well as men register for the draft: as Gallup polls have continuously demonstrated, however, most Americans, though favoring draft registration (and even, by a narrow margin, a reinstitution of the draft) oppose registration of women. One poll, conducted in the summer of 1981 revealed that 59 percent of those surveyed said that they "approved the Supreme Court ruling that women cannot be drafted". Only 36 percent disapproved of this rather distorted rendition of the Supreme Court's holding.

More significantly, crushing majorities have always opposed the notion that women should be eligible for combat duty, let alone required to participate in it. In a March 1980 Gallup poll only 21 percent of the population surveyed thought that women should be "eligible" for combat roles if any kind of draft were required. The wording of the survey question implied that women would not necessarily be obliged to serve in combat, but rather be allowed to volunteer to do so. In other words, this meager percentage does not even reflect the true import of an abolition of the combat exclusion policy, which would require female draftees to participate in combat. Never, to my knowledge, has much more than a third of the American public ever supported the notion of women participating in combat. I would also note parenthetically that larger percentages of women oppose female conscription than do men: in the 1981 poll referred to above 64 percent of women (as opposed to 53 percent of men) opposed drafting women.

Proposition #3: The Proposed Abolition Of Combat Exclusion Is Without Precedent

Only in the direst emergency, when a nation has already suffered terrible human losses, when the home territory has been invaded, and when the threat of national extinction is at hand, do we find large scale conscription of women for combat. The Russians drafted large numbers of women during World War II, sending some (by no means all, probably not even most) to the front — where they do not seem have made a powerful impression on their German enemies. After the war the Soviets stopped drafting women, and today the Soviet Army has scarcely any female soldiers. Although Soviet women have long participated in a host of activities "untraditional" in Western eyes — industrial labor, for example, or medicine — the Soviet military leadership has refrained from incorporating them into the standing forces of the Soviet state.

The case of Israel, a democratic state with, if anything, a more egalitarian heritage than our own, is even more to the point. From the founding of the first Jewish settlements at the beginning of this century through the 1948 Israeli War of Independence, women served in the underground Jewish militia. For a brief time, combat units of the Israel Defense Forces (IDF) contained men and women: by the end of that war, however, when the acute manpower and strategic crisis of the opening stages had been overcome, women returned to vital but nonetheless non-combat roles.

Today, Israel drafts on the order of fifty percent of its women for a two year tour of duty. These conscripts serve in the equivalent of our old Women's Army Corps, the Cheyl Nashim. Although trained in basic weapons handling, they do not serve in combat units, and are carefully excluded from front line positions — indeed, the IDF made some effort at the beginning of the 1973 war to evacuate as many women as possible from exposed bases in the Sinai in order to lessen their exposure to combat. Women do not, as in the American Army, have military occupational specialties which are likely to place them on the front lines, even if they are not "combat" specialties per se.

We thus have two countries which have had experience with women in combat, which maintain substantial and powerful military establishments, and which work from ideologies sympathetic to the use of women in combat. Neither sends women into combat today, nor would seem to have serious plans to do so in the future. In view of these facts, it is evident that an American decision to sweep away all gender barriers in the armed forces would constitute an experiment in military organization of unprecedented proportions.

Proposition #4: An End to Combat Exclusion Would Damage the Armed Forces

Military organizations have functions and requirements utterly different from those of civil organizations such as businesses, educational institutions, or governmental bureaucracies. In the words of the greatest student of war:

> War is a special activity, different and separate from any other pursued by man. ... No matter how clearly we see the citizen and the soldier in the same man, how strongly we conceive of war as the business of the entire nation... the business of war will always remain individual and distinct.[2]

We must not judge military organizations by the standards we apply to their civilian counterparts, for the task of military organizations is incomparably the more difficult: to prepare men to suffer and endure — and to inflict yet greater suffering and privation on an enemy. War calls forth from those who participate in it levels of physical and emotional exertion quite unparalleled in the civilian realm, and for its successful conduct requires group cohesion and morale equally extraordinary. It is clear that women can serve and do serve successfully at all levels of employment in the American business corporation, university, or governmental bureaucracy. Such, however, cannot be the case for the armed forces.

As numerous combat historians (such as General S. L. A. Marshall) and sociologists (such as Edward Shils and Morris Janowitz) have observed, military effectiveness rests primarily on the cohesiveness of small groups of soldiers. The relationships among these small groups — be they in a rifle squad, a team of combat engineers, or gun crew — take on enormous importance for those who belong to them. In the final analysis, soldiers keep their courage in the midst of danger not because they make realistic estimates of their predicament, and not even out of a sense of patriotism: rather, they overcome their fear because of their sense of brotherhood with those about them, their fear of "letting down" their buddies on the one hand, and their desire to preserve and protect them on the other.

This phenomenon, known in the jargon of social psychology as "male bonding" and particularly well-depicted in movies such as The Deerhunter or The

Big Red One, crucial to military effectiveness, is threatened by the intervention of disturbing factors such as romantic or sexual attachments or jealousies.[3] In the conditions of campaigning — conditions of prolonged physical misery and psychological stress — nothing is more important for the success, indeed the survival, of an army than the cohesiveness of its small groups. It is the quality that gave the outnumbered and in some respects under-equipped British Commandos, Paratroops, Guards, and Gurkhas their victory over superior numbers of dug-in Argentine soldiers in the Falklnds last year; it is the quality that allows the Israelis to hold at bay forces many times their number; it is the quality that all good armies everywhere seek to create and maintain.[4]

What motivates men to fight? In a recent article favoring the use of women in combatant units the author admits the following:

> Let me offer an additional explanation for men's resistance to allowing women in combat units. I conjecture that there is a psychological differentiation between the 'real world' and combat that enables some men to survive the enormous psychological stress of combat. One survives by preserving a mental picture of the normal world back home to which one will return from the horror world of combat. One is engaged in an elaborate game (albeit one with very high stakes) and when the game is over, one can go home to an intact world. One of the major components of the world back home is women, 'our women', who are warm, nurturant, ultra-feminine, and objects of sexual fantasy. Women (at least 'our women') are not part of war. Indeed, one of the reasons for fighting is to protect our women and the rest of what is in that image of the world back home. If we allow these women into combat with us, then this psychological differentiation cannot be maintained, and we lose this psychological defense."[5]

The author lamely concludes, "If these speculations are accurate, I do not know precisely what effect women in combat would have on combat unit cohesion." These are not, in fact, mere speculations, but a statement of sociological fact, confirmed by empirical studies of soldiers' morale.[6]

Military organizations make conscious use of masculinity — appeals to it and indeed at times exaggerations of it.[7] We observe this in the marching cadences of a platoon of troops, the psychological and physical challenges of basic training, indeed the everyday language of sergeants talking to young privates. It occasionally strikes us as tasteless or vulgar, but it performs an invaluable service in welding groups of young men into units of proud, aggressive, and competent soldiers.

The question of physical capacities therefore, though an important one, is in some respects besides the point. There are, no doubt, some women capable of marching twenty miles a day with an eighty pound rucksack, manhandling an antitank missile, or hauling the body of a wounded comrade to safety. The wholesale incorporation of women into units of all kinds, however, will rip the fabric of cohesion at a number of points, and in combat, that can mean the difference between life and death.

I hasten to add that many uniformed women have in the past and will continue in the future to play an honorable and useful, indeed, a vital role in our nation's defense. This has been the experience of our country and others in direr straits, such as Israel. There are many military positions for which women are as well or perhaps on average better suited than men. But it is, I believe, clear that many military jobs should be confined to men, that women should be integrated into military units only with the greatest of care, and that the ERA's abolition of gender-based criteria in the armed forces would be an unmitigated disaster.

Conclusion

Throughout these hearings you have heard or will hear how the Equal Rights Amendment will affect the legal and financial status of various institutions. Many of the consequences will be serious, but there will be those who will consider the cost or inconvenience inflicted worth the goal of complete sexual equality. Similarly, in the military realm the price of the Equal Rights Amendment will include the expense of cumbersome draft procedures, the personnel turbulence caused by pregnant soldiers, or the inconvenience of measures to preserve privacy in the field. But here the price of the Equal Rights Amendment will encompass an infinitely greater cost, that most precious of all commodities, the lives of young American men and women.

NOTES

[1] Brown, Emerson, Falk, and Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 Yale Law Journal, 968, 969, 973, 978.

[2] Carl von Clausewitz, On War, Michael Howard and Peter Paret trans., (Princeton: Princeton University Press, 1976), Book III, Chapter 5, p. 187.

[3] Romantic or sexual relationships can disrupt other organizations as well. See Eliza G. C. Collins, "Managers and Lovers," Harvard Business Review 61:5 (September/October 1983): 142-153. The author contends that these relationships are so inherently destructive to an organization that the member of the couple "least essential to the company or both have to go." If romantic relationships require such drastic reactions in the civilian world, how much greater the problem in military organizations, which make far greater demands on one's time and emotional commitment. Consider too the fact that military organizations simply cannot afford to move people around because of the vagaries of love.

[4] On the British in the Falklands, see Max Hastings and Simon Jenkins, The Battle for the Falklands (New York: W. W. Norton, 1983); on the Israelis see Y. Harkabi, "Basic Factors of the Arab Collapse During the Six Day War," Orbis (Fall 1967); Samuel Rolbant, The Israeli Soldier (New York: Thomas Yoseloff, 1970), pp. 157-165; on cohesion generally see S. L. A. Marshall, Men Against Fire (New York: William Morrow, 1947), pp. 138-156, see also the Shils and Janowitz article cited below.

[5] Mady Wechsler Segal, "The Argument for Female Combatants," in Nancy Loring Goldman, ed., Female Soldiers -- Combatants or Noncombatants? (Westport: Greenwood, 1982), p. 278.

[6] See Edward Shils and Morris Janowitz, "Cohesion and Disintegration in the Wehrmacht," reprinted in Edward Shils, Center and Periphery: Essays in Macrosociology (Chicago: Chicago University Press, 1975), pp. 355-6. When the physical survival of German soldiers' families was threatened, soldiers were more likely to desert; conversely, the greater the sense that they were defending those families, the greater the will to fight. Another way of substantiating the same point is to look at the effects on morale of mail from home, particularly mail from mothers, girlfriends, or wives.

[7] Ibid., p. 351-2, 359-360, 365; see also the remarkable discussion in Glenn Gray, The Warriors: Reflections on Men in Battle (1959; New York: Harper, 1970), pp. 59-97, a chapter entitled "Love: War's Ally and Foe".

I would like to thank Mr. David S. Cohen, Mrs. Judith R. Cohen, and Professor William Kristol of Harvard University's Kennedy School of Government for their help in preparing this testimony.

Senator **Hatch**. Thank you.

Ms. Chayes, we will turn to you now.

Ms. **Chayes**. Mr. Chairman, with your permission, I would like to condense somewhat my written statement.

Senator **Hatch**. That will be fine. We will put your complete written statement into the record.

STATEMENT OF ANTONIA HANDLER CHAYES

Ms. **Chayes**. The purpose of this hearing, it seems to me, is to illuminate one question: Whether the passage of the equal rights amendment would have an impact on our Nation's ability to sustain and field combat-ready forces in any emergency.

It is my firm belief that removal of legal impediments to permit the Armed Forces to fully tap a much larger pool of potentially capable and talented people will enhance national security. Nondiscriminatory utilization of over 50 percent of the population would radically alter the manpower equation in planning for mobilization. And, as experienced with peacetime utilization of women has demonstrated, the increase in numbers and gradual acceptance of women into specialties previously closed to them has improved the quality of manpower required for an increasingly technologically sophisticated fighting force.

It is necessary to assess the potential effectiveness of military manpower in the context of overall military strategy and planning. We are planning for military situations in which the potential adversary greatly outnumbers us in military manpower and equipment, in which his lines of communication and supply are likely to be shorter than our own, and in these circumstances we expect to compensate for numerical disadvantage by leveraging U.S. technological advantage both for its deterrent and warfighting value.

We have become increasingly aware that we have placed a crushing burden on the credibility of our nuclear deterrent. Despite the extensive and expensive investment we are now making to modernize our strategic and intermediate range nuclear forces, I think there is growing awareness that deterrent value has lessened. Nuclear war is not winnable, as President Reagan has come to understand and articulate. We therefore raise the nuclear threshold by increasing the deterrent value of the weapons systems and strategies of the wars that we can fight and that we can win. We have enormous strength in electronic and semiconductor technology to provide us with even more precise antiarmor weapons, antisubmarine warfare, technical air and C_3I. We must be able to produce, employ, maintain, repair and replace weapons systems with rapidity and effectiveness to counter great odds. It may be somewhat beside the point to state that there still remains a serious budgetary mismatch for strategy that has been accepted by military planners, but it is not beside the point to urge that we unshackle the manpower planners from the artificial legal and psychological barriers against using a major segment of the capability and talent needed for such an effective deterrent in warfighting strategy.

We would not cripple ourselves by limiting the pool of brown-eyed people nor would we think of eliminating entirely people with flat feet or nearsighted vision. It would be unthinkable today to exclude blacks and Hispanics, although it was still argued in World War II that desegregating the Armed Forces would impair the morale and the fighting capability of the white majority. Before President Truman's order of integration in 1948, there were violent demonstrations that turned into ugly race riots. It became clear that racial tension was sapping our combat strength. Gradual understanding of the impact of segregation on mission effectiveness moved us toward full integration. We learned in Vietnam to fight beside an ally who was shorter, lighter, weaker and culturally different. We contemplate a coalition defense including an even wider spectrum of cultural, linguistic, and operational variety.

I understand the fears that until now have kept the military the one area of Federal law where explicit sex discrimination exists. However, the experience of the last several years has proven those fears to be groundless, and it is time to put them to rest. Since the 1970's there have been great increases in the number of women serving in the Armed Forces, and these women have performed extremely well. Today the skills and capabilities provided by women have become so integral to the efficient operation of all branches of the armed services that in any national emergency it appears the conscription of women is inevitable. In fact, plans have been developed for a draft of both men and women with medical skills.

Let me talk for a moment about the growth in women's participation. The consequence of the 1973 decision to eliminate the draft means now that from 1 in every 30 recruits being female the number has risen to 1 in 11, and the quality as we have documented has really grown.

In 1971, women comprised less than 2 percent of the Armed Forces. By 1981, the figure had grown to about 9.4 percent. It has flattened now, but pre-1980 projections did not flatten that growth for several years, and it was really planned to rise to 16 to 18 percent.

In the late 1970's, I think the military cautioned against moving too fast. There were a number of studies done, and I have mentioned in my testimony the results of some of these studies. I think the major point that I wanted to make is that all these studies designed to prove the negative have managed to demonstrate the positive. The studies have shown discipline and courage on the part of women, and yet they still continue to be studied.

In 1980, the message from the services was to go a little more slowly.

It has been suggested that part of the trend toward retrenchment was not only a reassertion of old prejudices but a response to the economic slump and the sharp rise in unemployment that made unanticipated numbers of better male recruits available. The initial decision to increase the numbers of military women emerged in the 1970's as a way of insuring adequate numbers for the All Volunteer Force. When the economy recovered and the need for women diminished then the studies such as "women pause" were undertaken. The studies seemed to proliferate. I think, moreover, the elasticity in the definition of "combat" also appears to be a function of his kind of exigency.

But now that women comprise about 10 percent of our military force, it is unrealistic to think that they are going to be made to disappear at any given time. It is time to recognize the fact that they have performed well and they are here to stay. Yet despite their demonstrated value, women have suffered discrimination. Much of it is subtle and even unconscious. When I first arrived in the Air Force in 1977, I found that the numbers of women had been kept very low. When I asked the manpower planners to double it, I found that met with general acceptance, and it really proved the point that limitations had been more or less arbitrary.

I think prejudice remains in a number of other ways. There is a great deal of vocal concern expressed about pregnancy, but other disabilities plague managers because of their negative effects on efficiency and productivity. The continued emphasis on pregnancy as an argument against women in the military suggests that it is a major cause of attrition and absenteeism. The fact is that men in the military lose about 67 percent more time than women while on the job including the pregnancy factor. The overwhelming percentage of lost time is caused by desertion, alcoholism, drug abuse, and discipline problems, those experienced primarily by men.

Our life patterns have changed, and even the courts have long since recognized that pregnancy is not cause for involuntary discharge.

Once the baby is born, a distinction must be made between those who leave the service and those who can make satisfactory adjustments for child care. Personnel managers rightly, I think, are concerned with adequate child care arrangements because the service member has to be able to respond rapidly in an emergency. Yet I found that no priority early on was given to women in the military child care centers, and it took a lot of effort to begin to upgrade those institutions for children to make them adequate. In any case, adequate child care is not just a female service member's problem. In the Air Force, for example, the majority of single parents, 58 percent, are men, and those percentages hold for all three services more or less. I think there are real problems. There are real problems for men with custody of children and for service couples. It is time to address pregnancy in the context of the broader issues.

I think the experience of women in nontraditional fields has been on the whole encouraging, though it has discouraging aspects. Women have felt themselves to be trailblazers and found great satisfaction in developing skills in fields that had been closed to them in civilian life. I am also aware that there has been some migration of women to more traditional fields. It takes time for adjustment to these nontraditional skill requirements. Men have also tended to migrate from the dirty work. In fact, in those fields one finds the greatest amount of drug abuse. Overall, the attrition rate for women has not been substantially higher than men, and the increased flexibility in allowing specialty changes has paid off. Unfortunately, it is always the failures that get highlighted to the public.

What concerns me is that this history of discrimination against women and the restrictions in effect today have seriously damaged women's career progress in the Armed Forces, and in fact, it damages our national security. Women are denied opportunities, not on the basis of their skills or capability, but solely because of their sex. I saw this in the whole pilot training issue. I worked on the WASP legislation in order to bring recognition of the fact that more than a generation earlier women had flown every aircraft in the inventory, and yet, in the late 1970's the women were kept in test status until it became embarrassingly obvious that they could fly any aircraft to which they were assigned.

It is hard to expect the Air Force to invest time and money to train women to operate fighter aircraft or bombers if they are unable to use the women as pilots during a crisis. So therefore fewer women are rated than aspire to pilot training. I think this use of quotas interferes with career advancement. The same is true with Army and Navy career lines where combat restrictions limit opportunities for training, education, assignment, and promotion. But more important, perhaps, I think than the effect on women's careers, is that restrictive policies deprive us of needed military strength.

In my view, gender-based restrictions serve very little purpose. Administrative convenience has never been an argument that persuaded the courts, and with respect to the military, the administrative argument is not generally persuasive at all. Gender-based restrictions permit unexamined prejudices to everyone's detriment. The example that I often cite is the restriction of the missile career field to men officers. We made the change in 1978 so that women were introduced into the Titan system. This was not a combat exclusion. Nor was it capability that excluded women from the Minuteman II and III. It was the fear of wives' resentment over two-person silo manning. Other professions have overcome these problems with little disruption to family life and no interference with professionalism. I was glad to learn that women will be assigned to the GLCM deployments in Europe, but I really cannot find the military rationale for that distinction.

The ERA will secure for military women the fair professional treatment that they have not fully gained to date. The ERA will offer consistency of treatment for military planners and for women who want to plan lifelong career commitments.

The ERA would eliminate gender-based restrictions in the statutes, regulations, and practices. The statutes that limit the utilization of women by the Air Force and Navy, 10 U.S.C. 8549 and 6015 have served to restrain that advancement without serving military purpose. These provisions have been the source of policy confusion and fluctuation. There are inconsistencies within services and across service lines. For example, in the Air Force, women pilots may not be assigned to duty in aircraft engaged in combat missions. They can fly long-range transports, the C-141, but not intratheater aircraft, but the C-141's sometimes land in the theater.

The "risk of hostile fire" is not a criterion that translates easily to military assignments. Women in traditional roles, nursing, for example, have not only faced hostile enemy action but have died and been prisoners of war in the service of their country.

The Navy's restriction, up to 1978, expressed no restriction about aircraft. 10 U.S.C. 6015 restricts permanent assignment to combat vessels. Since few ships are likely to remain unengaged in war, there are few permanent billets. Thus career advancement is hampered because shore billets must be kept open for rotation.

The Coast Guard, by contrast, has no statutory restrictions, and women serve well in a wide range of shipboard roles. The Army also free from these legislative restrictions has imposed its own combat exclusion and has gone through a number of iterations in the definition of combat, increasing the exclusion from 38 to 61 specialties and back down again to 49.

We worked hard during the Carter administration to eliminate the combat restrictions. On several occasions we sought repeal of those provisions so as to release the services from a burden of difficult legal construction and to leave military assignments to the discretion of military experts. I am convinced now that it will take the ERA to accomplish this goal.

The implications of such a change are frightening to many people. The shibboleths of women wounded and tortured, failing in courage and destroying unit morale are not easy to overcome, but it is important to remember that almost any war in which we can contemplate extensive U.S. military involvement is a war that is likely to involve our Nation's soil. It will not be possible to protect women from the scourge of war, if, in fact, we have been unable to deter war from the beginning.

Under ERA, the sex-specific barriers in the selective services laws and its assignment policies would have to be replaced with gender-neutral criteria. The military will not be required to utilize soldiers who are unfit or untrainable, will not be able to exclude women from positions on the grounds of assumed lack of qualifications. By enlarging the pool of qualified applicants for positions requiring specialized skills, ERA will strengthen, not weaken, national defense.

Up to now, under present constitutional tests, the deference given to the military has obscured decisions rooted in prejudice and unexamined stereotypes. With the adoption of the ERA, explicit gender-based exclusions would fail. Tests of strength and apptitude will have to bear proper relation to the tests whose qualifications they purport to describe. The entire history of litigation under title VII has illuminated the importance of such validation. While it is costly to construct validated tests, it is a process already well begun and well worth that cost and effort. It will match personnel to task based on performance criteria and help assure greater productivity and effectiveness.

In my view, should we move to a draft, I would expect women to be included even without the ERA as a matter of military exigency.

But in my view, however difficult it would be to make a case for excluding women from the draft today, I do not think it will be possible to do so after the passage of the ERA. Its incorporation in the Constitution will mean that any classification based on sex, just as race, will be unacceptable.

The obvious and explicit gender-based exclusions will be eliminated by the services, probably without resort to the courts. Civilian and military leadership have already urged the end of major statutory restrictions in order to enhance the flexibility and to promote national security.

Yet I do not believe the courts would construe the ERA to preclude legitimate transitions or cause the courts to be deaf to all evidence explaining disparate impacts in military assignments. Strength differences remain, and the impact of long-term vocational tracking on job selection may continue for some time to come. There may be reasons to provide transition to ameliorate sociological problems. It will be necessary to develop understanding of the impact of larger numbers of women generally and in the fields presently closed to them. While the burden of justifying neutral standards that may effectively exclude women will be increased, congressionally examined and approved policies of the military which have been carefully designed are not apt to meet court disapproval. They will not place a crushing burden on national security. Indeed, the requirement of providing an objective rationale for policies with a disparate impact is not an impediment to national security at all. Our military services bear a burden of strict scrutiny on budget items every year before Congress. They are well equipped to make their case when they have strong factual evidence.

No one is proposing social experiments that endanger national security, but the time has come to accept the contributions that women have made to our Armed Forces. Despite all the evidence of a job well done, the resistance keeps cropping up. Despite tests and studies designed to prove the negative, as I said, the results are positive. The ERA is needed because the current legal framework is inadequate to sustain progress.

For all women, discrimination in the military has a profound effect on their status as citizens. Womens' exemption from full military service interferes with their access to national leadership roles. Military service is often seen as a political credential. It has been credited with legitimizing the citizenship status of other groups, particularly racial minorities. Nearly all men are subject to the military call if they are needed in a national emergency. It is seen as a basic responsibility of citizenship, one that is currently denied to half the citizens of the country.

I urge this committee to support the equal rights amendment not despite its consequences for national security, but because it will strengthen our ability to meet all military requirements and still eradicate a remaining bastion of inequality in our society.

Thank you.

[The prepared statement of Ms. Chayes follows:]

PREPARED STATEMENT OF ANTONIA HANDLER CHAYES

The purpose of this hearing is to illuminate one question: whether the passage of the Equal Rights Amendment would have an impact on our nation's ability to sustain and field combat-ready forces in any emergency.

It is my firm belief that removal of legal impediments to permit the armed forces to fully tap a much larger pool of potentially capable and talented people will enhance national security. Nondiscriminatory utilization of over 50% of the population would radically alter the manpower equation in planning for mobilization. And, as experience with peacetime utilization of women has demonstrated, the increase in numbers and gradual acceptance of women into specialties previously closed to them has improved the quality of manpower required for an increasingly technologically sophisticated fighting force.

It is necessary to assess the potential effectiveness of military manpower in the context of overall military strategy and planning. We are planning for military situations in which the potential adversary greatly outnumbers us in military manpower and equipment; in which his lines of communication and supply are shorter than our own. In these circumstances, we expect to compensate for numerical disadvantage by leveraging U.S. technological advantage both for its deterrent and warfighting value.

We have become increasingly aware that we have placed a crushing burden on the credibility of our nuclear deterrent. Despite the extensive investments we are now making to modernize our strategic and intermediate range nuclear forces, there is growing awareness that their deterrent value has lessened. Nuclear war is not winnable, as President Reagan has come to understand and articulate. We therefore raise the nuclear threshold by increasing the deterrent value of the weapons systems and strategy of the wars we can fight and win.

We have enormous strength in electronic and semiconductor technology to provide us with even more precise anti-armor weapons, antisubmarine warfare, tactical air, and C3I. We must be able to produce, employ, maintain, repair and replace weapon systems with rapidity and effectiveness to counter great odds. It may be somewhat beside the point to state that there still remains a serious budgetary mismatch for a strategy that has been accepted by senior military planners. It is not beside the point to urge that we unshackle manpower planners from the artificial legal and psychological barriers against using a major segment of the capability and talent needed for such an effective deterrent and warfighting strategy.

We would not cripple ourselves by limiting the pool to brown-eyed people, nor would we eliminate entirely people with flat feet or nearsighted vision. It would be unthinkable today to exclude Blacks and Hispanics although it was still argued in World War II that desegregating the armed forces would impair the morale and fighting capability of the white majority. Before President Truman's order of integration in 1948 there were violent demonstrations that turned into ugly race riots. It became clear that racial tension was sapping combat strength. Gradual understanding of the impact of segregation on mission moved us toward full integration. We learned in Vietnam to fight beside an ally who was shorter, lighter, weaker and culturally different. We contemplate a coalition defense including an even wider spectrum of cultural, linguistic and operational variety.

I understand the fears that until now have kept the military the one area of federal law where explicit sex discrimination still exists. However, the experience of the last several years has proven those fears to be groundless, and it is time to put them to rest. Since the 1970's, there have been great increases in the numbers of women serving in the armed forces, and these women have performed extremely well. Today, the skills and capabilities provided by women have become so integral to the efficient operation of all branches of the armed services that, in any national emergency, it appears that conscription of women is inevitable. In fact, plans have already been developed for a draft of both men and women with medical skills.

The unprecedented growth of women's participation in the armed forces was a consequence of the 1973 decision to eliminate the draft. Well before the end of the 1970's the United States had emerged as the world leader in the use of military womanpower, both in total numbers and in proportion to the total force. By June 1977, more than 110,000 line officers and enlisted women were on active duty, and the numbers were still climbing, even in the face of overall military force level reductions. In 1972, one in every 30 enlisted recruits was a women; by 1976, the number had risen to one in every 13; today, it is one in 11.

Contrary to initial fears about the all volunteer force, the quality of new recruits actually increased following the removal of the draft, as measured by such indicators as mental aptitude and educational attainment. One reason for this qualitative improvement was the expanded recruitment of women, who were required to meet higher standards. More than 91% of all female recruits were high school graduates, as compared with less than 67% of the men. And high quality women proved to be far less expensive to recruit than men of comparable quality. For example, the Army spent about $3700 to recruit a "high quality" man v. $150 for a comparable quality woman or man deemed less qualified by the services.

In 1977, the Brookings study by Binkin and Bach, *Women and the Military*, estimated that, without radically departing from current policies and practices and without disrupting the rotation or career opportunities for men, close to 600,000 military enlisted jobs -- or 33.3% of those performed by the enlisted force, could *potentially* be filled by women. Because the estimates varied widely from service to service, and some were clearly unrealistic, the study concluded that the number of military enlisted women could eventually reach 400,000, or 22% of the force -- more than double the expansion planned by the Pentagon.

DOD asked the services to submit their own manpower data to evaluate the potential for using women. In that evaluation, the overriding issue was combat effectiveness. The services' data indicated that out of a total of 1.5 million enlisted and 244, 500 officer positions, only 40% of each could be identified as either combat or combat support. This left well over half of the enlisted and officer positions as theoretically available to women --again, with wide variations among the services.

In 1971, women comprised less than 2% of the Armed Forces. By 1981, the figure had grown to 9.4% and projections made before 1980 did not flatten appreciably for several years, rising to 16.5% for 1984.

In the late 1970's however, the military cautioned against moving too fast in expanding the roles and numbers of women "until such time as we have confidence that the basic mission .... can be accomplished with significantly more female content in the active force." And the services employed a variety of techniques to refute their own manpower data and reduce the numbers of positions "available" to women -- techniques ranging from the "lack of adequate facilities" argument to the development of an elaborate and arbitrary system of percentages based on each unit's expected distance from forward combat areas in war-time. The Army flatly contended that it should not be forced to increase the number of enlisted women until it had evaluated the impact of such increases upon mission effectiveness. As many had feared, decisions were made during the first year of the Reagan administration to postpone further increases until the impact of increasing numbers of women in the military could be more systematically addressed. And today, the growth has slowed dramatically. In 1969, for example, the number of military women on active duty in the Air Force comprised 1.5% of the total. By December of 1979, that percentage had increased to 9.9%. Projections for 1984 indicated an increase to 16.5% In fact, however, the percentage is now only 11.2%, and is expected to reach only 11.4% by 1985. The projected growth figures for the other services have leveled off similarly.*

Still, between 1971 and the end of 1981 the number of women in the military more than quadrupled and by 1981 55% of the enlisted women were in traditionally all male specialties. This is critical, I think, because of the advanced technological nature of our weapons systems. Traditional notions of battle have been radically altered, as all service strategic planning recognizes. Hand-to-hand combat may always exist, but advance systems are likely to be far removed from the battlefield, and may even include civilian maintenance. It is not surprising that acceptance of women has been higher in those areas in which the weapons systems employ technologies found in the civilian labor force. Conversely, I think we must recognize the fact that the range and scope of today's weapons make it unlikely that the FEBA will ever again be clearly delineated. If we want to protect women from high risk of casualty, we will have to bury them underground.

In both traditional and nontraditional positions, and in the many tests designed to measure the impact of women upon the performance of their military units, the findings were the same. The women performed well, and did not adversely affect either the morale or the performance of the unit.

In a series of studies and tests (The Women Content in the Army), the Army demonstrated that women did not adversely affect unit performance in support and combat-support units and in combat unit headquarters above battalion level. Although in theory the tests were designed to reveal what proportion of women in a unit (up to 35%) would produce a deterioration in unit performances, the Army discovered that "when properly trained and led, women are proving to be good soldiers in the field, as well as in garrison." The Commander in Chief of the United States Atlantic Fleet concluded his report on the U.S.S. Sanctuary experiment with women aboard ships with the statement that "...Given the Sanctuary's conclusion that both men and women have merged into members of a common disciplined crew, the pilot program has clearly been a success." During 1977 Congressional hearings,* representatives from the Army, the Navy and the Air Force reported that the women they enlisted were better educated, attained higher scores on standardized tests of mental ability, and had lower attrition rates than their male counterparts. In addition, as Col. Frank A. Partlow, Jr., has noted, "Women have survived POW incarceration better than men, they have a higher pain threshold, and perform better under sleepless conditions." However, I could quote such studies and findings to you all day, only to find, as Senator William Proxmire once noted:

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* Army - 9.7% 1983; 10.3% projected for 1987; Navy - 8.3% 1983 (46,799 women in total force of 651,000); projected increase of only 4,600 women to steady state of 51,400 women by 1985.

> "Every study indicates that qualified women soldiers can serve in any capacity. But each time the Pentagon receives a report confirming this conclusion it... simply commissions another study."

With the 1980 election, many military women sensed that an antiwoman sentiment that had been building in the armed forces was becoming a reality. Senior military personnel worried that manpower policy decisions were being made by amateurs interested in social equality and political expediency rather than in the requirements of national defense. In December 1980, the Army and the Air Force secretly submitted to the Reagan transition team a proposal that the female enlistment goals set by the Carter administration be eliminated until women's impact on force readiness could be determined. In February 1981, the Army announced that it planned to cut back on its recruitment of enlisted women. Although the Army spokesman explained that most of the women were "doing a really fine job and were valuable and productive soldiers," there was some concern about "the combat effectiveness of the organizations as you have large numbers of women in them." The Army based this decision not on hard data, but on the feelings of field commanders. An extensive study was under way to determine how "pregnancy, sole parenthood, lost time and physical problems impact readiness."

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* Hearings before the Subcommittee on Priorities and Economy in Government of the Joint Economic Committee Congres of the United States, July 22, 1977.

As part of this "womanpause" study, the Army decreased its recruitment goals for woman and developed a multi-tiered weight lifting test for recruits that was expected to bar women from about 76% of the Army's jobs. In response to OSD opposition to the plan, the Army has now proposed a modest increase in its recruitment goals, an expansion of the job categories open to women, and a modification of the physical strength test from 100 pounds to 80 pounds. Although women who could not pass this weight lifting test would no longer be barred from jobs requiring heavy lifting, as initially proposed, they would be "counseled about their choice."

It has been suggested that part of the trend toward retrenchment was not only a reassertion of old prejudices, but a response to the economic slump and the sharp rise in unemployment that made unanticipated numbers of better male recruits available. The initial decision to increase the numbers of military women emerged in the 1970's, not only as a matter of equity, but as a means of ensuring adequate numbers for the All Volunteer Force. Once larger numbers of men became available, the recruitment of women leveled off. When the economy recovers, there is likely to be renewed interest in female recruits. The fuzziness in the definition of combat also appears to be a function of such exigency. The definition when applied to assignment of women bears little relationship to combat pay or decoration.

Now that women comprise approximately 10% of our military force, it is unrealistic to think that they will simply disappear from view in time of war, with no trained replacements available. It is time to recognize the fact that the women have performed well, and are here to stay. Yet despite their demonstrated value to the armed services, military women have suffered discrimination. Much of this is subtle, even unconscious, but it serves both women and our national security poorly. When I first arrived as Assistant Secretary of the Air Force, I found that the numbers of women had been kept artificially low. Yet when I made increasing those numbers one of my first priorities, I met with general acceptance. However, I was distressed by the fact that prior to my arrival no one had seen arbitrary exclusion of women as a problem.

Female security police, dissatisfied with their poorly fitting clothing and shoes, were unable to receive any satisfaction. Such subtle kinds of discrimination can be very damaging to morale. Overall, I found many contradictions in the Air Force. There was great support, some resentment and overprotectiveness. Many male officers were not willing to be tough enough -- they were too easily moved by tears. Yet on the whole the Air Force was quite open to the idea of increasing the numbers of women, and were proud of the skills and capability of Air Force women.

Yet prejudice remains. A great deal of vocal concern is expressed about pregnancy. But several other disabilities plague managers because of their negative effects on efficiency and productivity. The continued emphasis on pregnancy as an argument against women in the military suggests that it is the major cause of absenteeism and attrition. The fact is that men in the military lose about 67%* more time than women while on the job -- including the pregnancy factor. The majority of lost job time is caused by desertion, alcoholism and drug abuse, which are problems experienced primarily by men. Moreover, although it is claimed that 10-15% of women in service are pregnant, no distinction is made between those who are on maternity leave, and those who can carry on with their duties.

Our life patterns have changed, and even the courts have long since recognized that pregnancy is not cause for involuntary discharge. Once the baby has been born, a distinction must be made between those who leave the service, and those who can make satisfactory arrangements for child care. Personnel managers are concerned with adequate child care arrangements, for the service member may need to respond rapidly in an emergency. Yet in the early years of my work in the Air Force, no priority was given to the children of military women in base child care centers, and it took a great deal of focus and effort to begin to upgrade these institutions. Moreover, adequate child care is not only a female service member's problem. In the Air Force, for example, the majority of single parents (58%) are men. There is a real problem. Men with custody of children, and service couples must work out their potentially conflicting commitments as well. It is time to address pregnancy in the context of these broader issues.

The experience of women in nontraditional fields has been both encouraging and discouraging. I remember dining with a group of enlisted women in Korea, and several of them told me that they had joined the Air Force because, in contrast to men, they felt themselves to be trail-blazers. They found they could develop and practice skills in fields substantially closed to women in civilian life. They were proud to be competent carpenters and aircraft maintenance workers. I have heard the same from women naval officers and pilots. Yet I am aware that there has been some migration to more traditional fields. The Air Force had a system for allocating enlisted women among a broad spectrum of specialities, so as not to create sex stereotypes as it increased its numbers. It takes a while for women to adjust to nontraditional skill demands. Moreover, men also tend to migrate from the "dirty" work. Overall, the attrition rate for women has not been higher than for men, and the increased flexibility in allowing specialty changes has paid off. Unfortunately, it is the failures that are usually highlighted to the public.

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* Women lose 422 days of service per 100 women; men lose 703 days of service per 100 men.

What concerns me greatly is that this history of discrimination against women, and the restrictions in effect today, have seriously damaged women's career progress in the armed services. For those women who choose military service as a way to gain an education or as career commitment, the impact of discriminatory policies is immediate and obvious. These women are denied opportunities not on the basis of their skills or capabilities, but solely because of their sex. As Assistant Secretary of the Air Force, I was frustrated that women pilots were kept in test status. I worked on the WASP legislation, in part to bring recognition that more than a generation earlier women had flown every aircraft in the inventory. Yet it is hard to expect the Air Force to invest the time and money to train women to operate fighter aircraft or bombers, if they are unable to use the women as pilots during a crisis. Thus far fewer women are rated than aspire to pilot training. This use of quotas interferes significantly with career advancement. The same is true for Navy and Army career lines, where combat restrictions limit opportunities for training, education, assignment and promotion. In addition to their effect on women's careers, such restrictive policies will deprive us of needed military strength. I think it reasonable to assume that we will need every pilot slot filled in a war-time situation, and we should now be developing the largest possible pool of qualified pilots. Eliminating a large percentage of qualified individuals from the pool because of their sex does not seem sensible.

In my view, gender-based restrictions serve very little purpose. Administrative convenience has never been an argument that persuaded the courts, and with respect to the military, the administrative argument is not generally persuasive. Gender-based restrictions permit unexamined prejudices to everyone's detriment. Thus, the Air Force had restricted the missile career field to men officers. I worked to make that change in 1978 and only partly succeeded. The introduction of women was allowed for the Titan system only. It was not the combat exclusion that kept them from Minuteman II and III; it was the fear of wives' resentment over two-person silo manning. Other professions have overcome these problems with little disruption to family life and no interference with professionalism. I was happy to learn that women will be assigned to GLCM deployments in Europe, but I am puzzled at the lack of military rationale for the distinction.

The ERA will secure for military women the fair professional treatment they have not fully gained to date. The ERA will offer consistency of treatment for military planners, and for women who want to plan lifelong career commitments.

The ERA would eliminate gender-based restrictions in statutes, regulation and practice. The statutes that limit the utilization of women by the Air Force and Navy, 10 U.S.C. §8549 and §6015, have served to restrain career advancement without serving a clear military purpose. They have been the source of policy confusion and fluctuation. There are inconsistencies within and across services. In the Air Force, women pilots "may not be assigned to duty in aircraft engaged in combat missions," under 10 U.S.C. §8549. Thus, they are permitted to fly long-range transports, C-141's, but not intratheatre aircraft, C-130's.

The "risk of hostile fire" is not a criterion that translates easily to military assignments. Women in traditional roles, nursing, for example, have not only faced hostile enemy action, but have died and been prisoners of war in the service of their country. The Navy's restriction, 10 U.S.C. §6015, expresses no concern about aircraft but restricts permanent assignment to combat vessels. Thus, if Navy fighter pilots were not carrier based, presumably they could include women among their number. But since few ships are likely to remain unengaged in war, there are few permanent billets. Thus, career advancement is hampered because shore billets must be kept open for rotation. The Coast Guard by contrast has no statutory restrictions, and women serve well in a wide range of shipboard roles. The Army, also free from legislative restrictions, has imposed its own combat exclusion. It has gone through a number of iterations in the definition of combat, increasing the exclusions from 38 to 61 specialties as we have indicated, and back down again to 49. When I served in DOD, we worked hard to eliminate the combat restrictions. On several occasions we sought repeal of these provisions so as to release the services from a burden of difficult legal construction, and leave military assignments to the discretion of military experts. I am convinced that it will take the ERA to accomplish this goal.

The implications of such a change are frightening to many people. The shibboleths of women wounded and tortured, or failing in courage and destroying unit morale are not easy to overcome. But it is important to remember that almost any war in which we can contemplate extensive U.S. military involvement is a war that is likely to involve our nation's soil. It will not be possible to protect women from the scourge of war, if we have been unable to deter war from beginning.

Under ERA, the sex-specific barriers in the selective service laws and in assignment policies would have to be replaced with gender-neutral criteria. The military will not be required to utilize soldiers who are unfit or untrainable, but will not be able to exclude women from positions on the grounds of assumed lack of qualifications. By enlarging the pool of qualified applicants for positions requiring specialized skills, ERA will strengthen, not weaken, national defense.

Up to now, under present constitutional tests, the deference given to the military has obscured decisions rooted in prejudice and unexamined stereotypes. With this adoption of the ERA, explicit gender-based exclusions would fail. Tests of strength and aptitude will have to bear proper relation to the tasks whose qualifications they purport to describe. The entire history of litigation under Title VII has illuminated the importance of such validation. While it is costly to construct validated tests, it is a process well begun and well worth the cost and effort. It will match personnel to task based upon performance criteria, and help assure greater productivity and effectiveness.

In my view, should we move to a draft, I would expect women to be included, even without the ERA, as a matter of military exigency. As former DOD Assistant Secretary Pirie (MRA&L) stated in the 1980 hearings on registration,

> "It is in the interest of national security that, in an emergency requiring the conscription for military service of the nation's youth, the best qualified people for a wide variety of tasks in our Armed Forces be available. The performance of women in our Armed Forces today strongly supports the conclusion that many of the best qualified people for some military jobs in the 18-26 age category will be women." (Registration of Women: Hearing on H.R. 6569, Subcommittee on Military Personnel of the House Committee on Armed Services, 96 Cong., 2d Sess. 17(1980).

But, in my view, however difficult it would be to make a case for excluding women from the draft today, I do not think it would be possible after passage of the ERA. Its incorporation in the constitution will mean that any classification based upon sex, just as race, will be unacceptable.

The obvious and explicit gender-based exclusions will be eliminated by the services, probably without resort to the courts. Civilian and military leadership have already urged the end to major statutory restrictions in order to enhance flexibility and promote national security.

Yet I do not believe that the courts would construe the ERA to preclude legitimate transitions or cause the courts to be deaf to all evidence explaining disparate impacts in military assignments. Strength differences remain, and the impact of long-term vocational tracking on job selection may also continue for some time to come. There may be reasons to provide transitions to ameliorate sociological problems. It will be necessary to develop understanding of the impact of larger numbers of women generally, and in fields presently closed to them. While the burdens of justifying neutral standards which effectively exclude women will be increased, Congressionally-examined and approved policies of the military which have been carefully designed are not apt to meet Court disapproval. They will not place a crushing burden on national security. Indeed, the requirement of providing objective rationale for policies with a disparate impact is not an impediment to national security at all. Our military services bear a burden of strict scrutiny on budget items each year before Congress. They are well equipped to make their case when they have strong factual evidence.

No one is proposing social experiments that endanger national security. But the time has come to accept the contributions that women have made to our armed forces. Despite all the evidence of a job well done, resistance keeps cropping up. Despite tests and studies designed to prove the negative, the results are positive. The ERA is needed because the current legal framework is inadequate to sustain progress.

For all women, discrimination in the military has a profound effect on their status as citizens. Womens' exemption from full military service interferes with their access to national leadership roles. Military service is often seen as a political credential. Military service has been credited with legitimizing the citizenship claims of other groups, particularly racial minorities. Nearly all men are subject to the military call if they are needed in a national emergency. This is seen as a basic responsibility of citizenship -- one that is currently denied to half the citizens of this country.

I urge this Committee to support the Equal Rights Amendment not despite its consequences for national security, but because it will strengthen our ability to meet all military requirements and eradicate a remaining bastion of inequality in our society.

Senator HATCH. Thank you. Both of your testimonies have been eloquent in their explanation of your respective positions. Before we begin the questioning I would ask the witnesses if you would be as succinct and as direct as you can in your answers. We are interested in knowing your perspectives on what constitutes prudent public policy in the area of the military, but we are equally concerned with learning your estimation of what precisely the impact of the ERA will be upon the military. We want to create as extensive a legislative history as time will permit.

Now, to enable all Senators here to participate fully, we will go by a 10-minute rule. When the red light comes on, I am going to interrupt the Senator questioning the witness and go to the next Senator. But we will make sure everybody has the opportunity to ask the questions they would like. Let me begin.

Ms. Chayes, the Selective Service Act currently limits its requirements for draft registration to male citizens. Would such a law be constitutional following the ratification of the equal rights amendment?

Ms. CHAYES. I believe that it would not, but the only exclusions will be based upon capability. There can be no gendered-based exclusions.

Senator HATCH. So you are saying the ERA would overturn the Supreme Court's decision relating to the issue in *Rostker* v. *Goldberg*?

Ms. CHAYES. Yes.

Senator HATCH. Do you agree with that?

Mr. COHEN. Yes.

Senator **Hatch**. Although we do not have an active draft system in force today, former provisions of the Selective Service Act limited draft eligibility to male persons. If such a draft law were reenacted by Congress, would it be constitutional following the ratification of the equal rights amendment?

Mr. **Cohen**. No.

Senator **Hatch**. Do you agree?

Ms. **Chayes**. No. What is really interesting is, I think, we are contemplating a very different draft. There will be a specialty draft. At present, without the ERA, the military is making plans to fill many medical positions with women. So in my view, there is no plan at this point for a males-only draft when you come right down to it.

Senator **Hatch**. But if we do have a draft law similar to the one that we have had in the past, would it be unconstitutional if the ERA is ratified?

Ms. **Chayes**. The exclusions could not be gender-based.

Senator **Hatch**. In other words, it would be unconstitutional?

Ms. **Chayes**. Yes.

Senator **Hatch**. Ms. Chayes, would it be constitutional for Congress to adopt draft deferment policies limited, for example, to mothers of dependent children, if the equal rights amendment is ratified?

Ms. **Chayes**. I think what you will find is hardship cases and draft deferment based upon the same factors that now prevail. The focus would be on the child, not on the parental relationship. I think you would find that there would be exclusions, or rather deferments, based upon child care regardless of the sex of the parent.

Senator **Hatch**. But would it be constitutional to adopt draft deferment policies limited to mothers of dependent children?

Ms. **Chayes**. I think that if you are saying that there would be deferments only for females who are parents that would probably not be constitutional. I think that if you looked at deferments for parents bearing major responsibility for children, and those turned out to be 90 percent women, that would be constitutional. The constitutionality would really depend upon whether it was stated strictly in terms of gender or whether it was stated in terms of function.

Senator **Hatch**. If the deferment standards that you describe as being acceptable were shown to result in deferring a disproportionately large number of mothers or women as opposed to fathers or men, would it survive the scrutiny of the courts of this land, if the ERA was ratified?

Ms. **Chayes**. As I stated, I think that all disparate impact is not going to fall. It is going to have to be justified by carefully drafted, well thought-out congressional action. I think in this case, and perhaps in a number of other hypotheticals that you could suggest, disparate impact could pass any scrutiny, any test that the courts want to impose on it. However, where disparate impact is simply a mask for discrimination, the practice would not be upheld.

Senator **Hatch**. But it would be up to the courts to make that determination?

Ms. **CHAYES**. If a practice is challenged in a constitutional case, it will be up to the courts, but what you build into the legislative history here will, of course, guide the courts.

Senator **HATCH**. I see. Mr. Cohen, what do you have to say about that?

Mr. **COHEN**. I think it quite conceivable that, under the circumstances that Ms. Chayes describes, that you could have a situation where you have a husband and wife and an infant, that the wife and mother would be drafted, and the father would remain at home.

I would also point out, and I think this is an issue that will cut across a number of subissues, that although in theory advocates of the equal rights amendment say that they are not concerned about disparate impact, as a matter of practical political fact there will be pressure to bring the percentages of men and women affected by any provision of this into equality. For example, if physical strength standards seem to have a disparate impact, those physical strength standards will be fiddled with to allow more women in.

This is something that actually happened quite recently.

Senator **HATCH**. You are saying the standards would have to be adjusted to reduce the disparate impact?

Mr. **COHEN**. Yes; that has already occurred at the military academies.

Senator **HATCH**. Under the ERA, Ms. Chayes, would sex-restricted military units such as the Army Nurse Corps or the WAC units be permissible? Now, I know that the WAC's have been abolished, but my question is whether the ERA would require that sex-restricted military units be abolished.

Ms. **CHAYES**. You certainly would not be able to exclude men from nursing.

Senator **HATCH**. So they would be abolished then?

Ms. **CHAYES**. Sex-segregated units as such would be abolished. Mostly they have been abolished without the ERA.

Senator **HATCH**. Do you agree with that?

Mr. **COHEN**. Well, it is true that they would be abolished. It is untrue that they have been abolished. Infantry battalions do not have women in them. Armor battalions do not have women in them.

This would be quite a considerable change. Throughout this debate, I think it is important to realize the extraordinary nature of the changes that would permeate the entire military establishment because of the equal rights amendment.

Senator **HATCH**. Prof. Norman Dorson, the president of the American Civil Liberties Union, has testified before Congress that under the ERA it would not be permissible to exempt from the draft women with small children but to draft men in the same situation. Do you agree with Professor Dorson, Ms. Chayes?

Ms. **CHAYES**. Not in exactly those words. I would go back to my position that the focus will be on the child, and the person responsible for the care of the small child will be exempt or will be deferred. I think that will be handled on a case-by-case basis.

If it turns out that 90 percent of children are in the care of their mothers, there will be the exemption, but as I pointed out in my testimony, the sole parent is male in over 58 percent of the cases in the military services now. So it will not be an entirely new problem in a draft situation.

Senator HATCH. I am not asking here about the wisdom of the policy. I am just asking what would happen if the ERA is ratified.

Ms. CHAYES. I think my answer is, well, let me rephrase it so I can make it perfectly clear. The answer is that those people responsible for small children will be affected by the policy. But the policy can not be sex-specific. If the impact is disparate, and challenged, the constitutionality would be decided by the courts in a manner appropriate under the constitutional tests imposed.

Senator HATCH. But you are not sure because you said the disparate impact will have to be scrutinized by the courts.

Ms. CHAYES. That is right.

Senator HATCH. Mr. Cohen?

Mr. COHEN. I agree with Mr. Dorson.

Senator HATCH. Under the ERA, would existing provisions in the law excluding women as a class from combat be constitutional, Ms. Chayes?

Ms. CHAYES. If you can give me the definition of "combat," I would be able to respond much more easily. At the present time, there purport to be two statutory provisions that exclude women from combat. As such, those would fall. However, women have not been excluded from combat as a matter of reality. As a matter of being exposed to combat conditions, women have been there in just about every war.

Senator HATCH. My only question is, Would those laws fail that excluded women from combat regardless of how they are defined, if the equal rights amendment is ratified?

Ms. CHAYES. I think women are not excluded from combat now, and therefore, I think my response would be that whether the particular provisions would fall or not, which I think they would, would be irrelevant to the results.

Mr. COHEN. It would most certainly not be irrelevant to the results. I would add that we have not had experience of women in combat in anything like the way that we would have with the equal rights amendment.

Senator HATCH. Senator Kennedy?

Senator KENNEDY. Thank you.

Ms. Chayes, the fact that this decision with regard to an exemption for the parent of a young child is going to the court would not be anything new or dramatic, would it? There are so many cases that are raised over time with a new constitutional amendment. I suppose there would be some cases that would be raised under ERA. The tests would be established, and then people would follow what was ultimately decided.

But as I understand from your testimony that exemptions based on the need to care for a young child would be treated on an individual basis and that the criteria that would be established may or may not be tested. That is the way I understand your answer. Am I correct in that understanding?

Ms. CHAYES. That is right. I think the focus has to be the child and probably is the child right now. So that the question as to whether mothers will be drafted, a very emotional question, is really a red herring.

Senator KENNEDY. Well, I think that is worthwhile comment because there are a lot of red herrings, and I think one of the reddest of the red herrings is that we are always going to have to leave this to the courts, quote, unquote, to sort of try to suggest that those that support do not have a very carefully defined position, and I think that you have expressed it well.

Mr. COHEN. Senator Kennedy, would you like me to respond?

Senator KENNEDY. I would like to just question Ms. Chayes, if I could, and depending upon the time, I would like to get back to some questions for you in just a moment.

Having served as the Under Secretary of the Air Force, what was your experience concerning the performance of women generally in the Armed Forces?

Ms. CHAYES. I think their performance was superb, and I think they surprised everyone by their capability to adapt to nontraditional roles. There was certainly no disruption of the military mission that we were able to observe. Of course, we were not under wartime conditions, but I would say that we have more evidence on the effectiveness of women in the military through their performance in exercises than Professor Cohen and those he cites have on the lack of performance under military fire.

On the whole, they did extremely well. Where there were limited failures to adjust, I think the reasons turned out to be, after careful research, that there were failures to provide the kind of equipment the women could use. Just as with the Vietnamese, the military initially failed to provide equipment that fit the people. In some cases, there was a failure of training as well.

There was only one specialty in the Air Force that I can think of where performance was not very good. That was the security police. For the rest, the record was remarkable.

Senator KENNEDY. Do you think that they were basically underutilized in the Armed Forces or are underutilized at the present time?

Ms. CHAYES. Senator Kennedy, I would not say underutilized. I would say career-constrained, and I think that you have to admit that some specialties, for example, being rated, flying in the Air Force, or serving on warships, these are the kinds of career lines that lead to the top. Women have been constrained from careerlines that lead to the top. Therefore, we are likely to see many who will turn to other professions where they are not constrained.

In that sense, yes, underutilization.

Senator KENNEDY. I was wondering if you were familiar with that Army Reforger 1977 study, and I would like to ask if the relevant parts of the study can be made a part of the record, Mr. Chairman.

Senator HATCH. Without objection.

[Aforementioned study follows:]

EXCERPTS FROM REF WAC

PART I

EXECUTIVE SUMMARY

WOMEN CONTENT IN THE ARMY-REFORGER 77 (REF WAC 77)

BACKGROUND: Since 1972, considerable attention has been directed toward determining the impact of expanding the role of women in the Army. In 1975, the U.S. Army Training and Doctrine Command (TRADOC) reviewed unit structures to identify male or female positions which could be filled interchangeably and to determine the maximum number of women who can be assigned to units without adversely affecting the unit's ability to perform its mission. In 1976, the U.S. Army Research Institute for the Behavioral and Social Sciences (ARI) conducted a research effort to determine the effect on mission accomplishment of varying the percentage of women assigned to a unit. This effort, known as MAX WAC, evaluated 40 companies of five combat support/combat service support types, using ARTEP scenarios (72 hours in duration) for evaluation of group performance. The percentage of controlled-fill twice-tested units was either 0% or 15% for the initial ARTEP and either 15% or 35% for a second ARTEP six months later. The results of this research did not reveal significant differences in unit performance over the limited time period. The overall interpretation of both performance data and questionnaire responses was that female soldiers, up to the percent tested in the kind of units participating, did not impair unit performance during intensive 72-hour field exercises. Unanswered by MAX WAC results was the question of the impact of women on unit mission accomplishment in a field test of extended duration. Accordingly in 1977, ARI was tasked to design and conduct research to evaluate the role of women participating in REFORGER 77. The results are presented in this report.

PURPOSE: The purpose of this research was to assess the impact of female soldiers assigned to representative types of Category II and III units on the capability of a unit to perform its mission under extended field conditions. The objective was to provide empirical data to test the hypotheses that there will be no difference between all-male and mixed gender group performance and no difference between enlisted female and matched enlisted male individual performance that would impair unit performance.

APPROACH: Performance was evaluated in maintenance, medical, military police, signal, and supply and transportation units during their participation in the field training exercise (FTX) CARBON EDGE. The REF WAC research design revolved around the requirement for comparability of male and female performance data. These data were collected on a daily basis from unit supervisors by Test Directorate NCO data collectors acquainted with the soldiers being tracked; through observations of group and individual performance by independent officer evaluators from the Test Directorate; and by ARI administration of questionnaires to unit personnel before and after the FTX.

The Test Directorate consisted of 50 personnel organized into a headquarters staff and five teams, one for each type of unit. Each team consisted of a branch-qualified team chief (LTC), combat arms officer, female officer, and branch-qualified personnel. The team officers collected performance ratings on both ARTEP-type group events and Soldier's Manual-type individual events and made unstructured observations on other events relevant to REF WAC objectives. Since the research effort was directed not to interfere with the FTX, officer evaluators were required to select target of opportunity groups for evaluation. For group events, officers were to focus on events more likely to recur for both a female or mixed group and for one or more matching all-male group(s). For individual event ratings, officer evaluators were to select, for each enlisted woman on whom a rating was obtained, an enlisted man performing the same task. All performance ratings were made on a seven-point scale.

MAJOR FINDINGS:

The presence of female soldiers on REFORGER 77 did not impair the performance of combat support and combat service support units observed when unit mission was defined in terms of the REFORGER 77 scenario. Group performance ratings during the first and last periods of the exercise showed no difference between all-male and mixed groups. Although mixed groups showed a superiority over all-male groups during the middle period, the results were statistically significant for only one type of unit. This difference did not hold up when data from all units were considered. Similarly, there were no consistent patterns of individual male versus female performance differences over the entire exercise, whether the tasks performed were considered as a whole, were divided into common and unique tasks, or occurred in high stress or low stress companies. When daily performance ratings by supervisors in high stress companies were considered separately, enlisted women initially gave a statistically significant poorer performance than enlisted men during the first three days of CARBON EDGE but gained equality in performance by the last three days of the exercise. Aggregated sets of individual and group performance data for men and women showed a clear upward trend over time from the first three days to the last four days of the exercise. Of a total of 20 computed differences over time, 15 showed an increase, four remained the same and one showed a decrement. Thus REF WAC results provide a basis for increased credibility of MAX WAC findings, i.e., no difference in unit performance based on a 72-hour field exercise.

SUPPLEMENTARY FINDINGS:

- About 15% of available enlisted men and 29% of the enlisted women were not deployable from CONUS for REFORGER. Percentages were about the same for Europe-based troops. Of those nondeployables, 2% of the enlisted men and 11% of the enlisted women were nondeployable for personal reasons; 15% of the enlisted men and 12% of the enlisted women were nondeployable for administrative reasons.

- The percentage of enlisted women deploying in each unit (with one exception) was just under 10%.

- Enlisted women were proficient in MOS tasks, both traditional and nontraditional, and demonstrated improvement during the exercise. Yet, there was considerable concern at the troop level as to the capability of female soldiers to perform many of the critical duties of their MOS in support units.

- Slightly over 23% (49 of 229) of the enlisted women participating in REFORGER had nontraditional MOS but were assigned to traditional duties during REFORGER.

- Enlisted women did not perform as well in tactical and sustenance tasks as their matched male counterparts. None of the women observed was the product of the new basic training.

- With respect to questionnaire responses concerning how well enlisted women performed on REFORGER 77, enlisted men were most critical, NCO's were the next most critical, and officers were least critical of female performance.

- The performance of enlisted women, possibly more so than enlisted men, was affected by leadership and management deficiencies or policies. Leadership and management problems were widespread and appeared to be the underlying causes of many problems involving women who were observed in REFORGER.

- Considerable and widespread bias against women was observed in units, most significantly among first-line supervisors. The reasons most frequently given were physical strength factors, the risk of exposing women to combat, and added problems in hygiene, sanitation, and billeting. As often occurs with targets of bias, women as a group were rated poorly (questionnaire responses), whereas they were rated as highly as their male counterparts when rated individually (performance observations).

- Eighteen out of 89 MOS considered (98 MOS were in the MTOE's of the participating units) were designated as being physically too demanding for women by 50% or more officers or NCO supervisors.

- A number of factors, in addition to strength requirements, shaped the opinions of unit personnel as to where enlisted women are most appropriately utilized.

- Pretest and posttest surveys indicated that the percentage of enlisted women in paygrades E3 and E4 was higher than that of enlisted men (81% versus 70%). Average ages were essentially the same for men and women (21 years). Enlisted women had a higher level of education (97% versus 85% with high school or above on the posttest). Fewer enlisted women than men were married (21% versus 32% on the posttest); the majority of both enlisted men and women never had been married.

- Unit officers and NCO supervisors, when asked to distribute hypothetical numbers of women and men over the MOS in a company, assigned the personnel to MOS on the basis of concentration, proportionality and suitability factors. When women or men constituted a small proportion of personnel to be assigned, the respondents tended to concentrate the women in the least physically demanding MOS and the men in the most physically demanding MOS. As the number of women increased, women were distributed more proportionally throughout the set of MOS except in those MOS considered more suitable for men because they required working in the midst of combat brigades. The goal of concentrating women in less physically demanding MOS appeared dominant when small numbers were to be distributed but less dominant as the mix (male and female) approached half and half.

- While unit officers and NCO supervisors expressed concern regarding the impact of women on unit performance, they placed much greater importance on other factors as having a comparatively greater effect on mission accomplishment.

CONCLUSIONS: The value of REF WAC results is limited by the characteristics of REFORGER 77: the number of enlisted women present, existing weather and terrain conditions, and the kind of tasks enlisted women were required to perform. The noninterference rule precluded the use of standard events for scoring purposes. Workloads could not be simulated where natural workloads limited observation opportunities, and the variety of tasks could not be artificially increased. However, REF WAC results provide the best available information on performance of enlisted women in an extended field situation and provide evidence that enlisted women can perform their MOS-related duties adequately in a REFORGER-type field exercise. The effort has served to clear the air and make it possible to address, openly and directly, those concerns of field commanders that units with large numbers of enlisted women may have a reduced combat readiness due to larger numbers of nondeployable personnel and reduced capability to perform tactical contingency missions. The REF WAC effort is one of many contributions to policy decisions regarding the use of women.

PART IV

BRIEF OF MILITARY REPORT

1. INTRODUCTION AND OVERVIEW

An "Interim Report on Women in the Army, REFORGER 77" was prepared in November, 1977 as a part of an In-Process Review presented on 6 December 1977. This military report, provided by the REF WAC Test Director to the ARI Commander, also served as the preliminary report to the test proponents on the Test Directorate organization, data collection plan, operational conduct of the test, partial results and tentative conclusions, and recommendations of the REF WAC 77 Directorate immediately prior to its dissolution. As such, the report included some preliminary quantification and interpretation of objective data, as well as reporting of the observations, interpretations, conclusions, and recommendations of the separate teams of the Directorate. The initial quantified results included in the military report are redundant with the more complete analysis presented and described in Part III, and are not provided here. This brief, therefore, deals only with the non-quantified aspects of the experiences and expert opinions of the REF WAC Directorate members related to their evaluation of women's performance and women's impact on unit effectiveness under field conditions over an extended period of time, specifically during a REFORGER exercise.

This brief consists of a merger of the efforts of a contractor tasked to provide the essence of the military report without attempting to evaluate or screen content on either merit or consistency with the other parts of the report, and a similar effort on the part of the Deputy Test Director who remained in ARI until this report was submitted. The brief represents a joint effort by the latter and the ARI scientific staff.

2. CONCEPTS

a. Organization.

To manage the effort, the REF WAC 77 Test Directorate was established with 50 people organized into five observer teams to evaluate performance in maintenance, medical, military police, signal, and supply and transportation battalions deployed or participating in the REFORGER exercise in Germany. Each team contained branch-qualified officers, one combat arms officer, one female officer, two other branch-qualified officers and enlisted data collectors. They received thorough orientation on all aspects of the exercise and participated in the development of each of the rating modules. The placement of observer teams in close proximity to the rated individuals, teams, and sections was crucial to the results.

b. Methodology.

Initial criteria for group event rating modules were extracted from recent ARTEP experience. Individual performance standards for individual event rating were taken from Soldier's Manuals. Personnel records were screened from the units selected, including 360 women (of which 229 were deployed) and approximately an equal number of male counterparts. Rating modules were developed for three performance categories: job-specific tasks, sustainment tasks (e.g., tent pitching), and tactical tasks, (e.g., perimeter guard). In order to identify performance trends, the ratings for each module were obtained for the beginning, middle, and ending periods of the 10-day field exercise. To provide a basis for comparison, both male and female enlisted soldiers were rated. In addition to the individual ratings, team performance (all male groups, all female and mixed groups) was rated.

These time-phased evaluations, monitored on a daily basis, were augmented with interviews of all supervisors in the unit chain of command. Some flexibility in the collection effort and the opportunity for judgmental expression were provided by use of formatted reports. The reports included anecdotal comments on leadership, morale, etc., and a log of positive, as well as negative, incidents involving women, using a form labeled "Critical Incidents" (see Appendix A). These inputs, when combined, provided supportive data that could be used to validate the results or fill in gaps in the data base.

c. Limiting Factors.

Objective observations were constrained by a number of factors. These factors included:

(1) An obligation of the Test Directorate to USAREUR not to interfere with REFORGER or Exercise CARBON EDGE. Rules of noninterference permitted team members freedom of movement, observation and interview only on a nonpre-emptive basis. No action could be taken to increase the number of women in the exercise area nor increase the number of observations of individual and unit performance.

(2) One of the USAREUR based battalions, a military [illegible] unit, supported the exercise, but not in a player status. The unit was situated administratively in a tent city. As a result, no observations of this battalion could be made in tactical and field sustainment activities.

(3) A significant number of scorable events did not occur because of low levels of activity in combat support and combat service support units. For example, the DISCOM of the 1st Infantry Division, once deployed in the maneuver area, did not make a subsequent displacement. Major portions of two DISCOM units, the medical and maintenance battalions, remained in one location for two weeks.

(4) In the limited sample base of 229 women in the four CONUS and three USAREUR battalions selected for observation in the exercise area, [illegible] percent of these women were employed in such traditional roles as clerks and cooks.

3. FINDINGS AND CONCLUSIONS

Despite the limiting factors described above, the REF WAC Test Directorate staff recorded over 1800 observations of female performance as individuals and members of teams or sections before and during REFORGER 77 and Exercise CARBON EDGE. After-action reports, postexercise questionnaires, and final critiques indicated that REFORGER 77 did in fact provide a viable means of assessing the impact of women on units operating in a protracted field environment. The significant findings and conclusions deal with:

a. Impact on Unit Effectiveness.

(1) Findings.

Women were observed performing in a wide cross section of Army combat support and combat service support units at the division and corps level. The branches and/or specialty areas covered were maintenance, medical, military police, signal, and supply and transportation. It was determined that the women had little or no adverse impact on the performance of their units. In a general sense, the women observed were contributors having a favorable impact on unit performance.

The following incidents, which far outnumbered derogatory ones, clearly demonstrate the contribution to unit effectiveness made by the conscientious, hard-working, and well-motivated female soldier:

(a) An enlisted woman was released from convalescent leave following major surgery. She was going to be left behind at Fort Riley but insisted on participating in REFORGER. Her performance was outstanding during the exercise.

(b) Two somewhat irresponsible male MP partners were split up by the supervisor. The supervisor paired one enlisted male with an enlisted woman, observing that the woman would "straighten him out."

(c) Two enlisted men told a REF WAC 77 observer that if they had to choose a partner, they would just as soon pick the new enlisted woman, who had a reputation as a good worker.

(d) A female MP on the third day of the exercise required minor surgery for an infected finger. She expressed the desire to remain in the field, and was able to return to duty and continue her good performance.

(e) A female MP was performing duty at a traffic control point when she experienced a severe toothache. She was given emergency dental treatment and chose to return to duty rather than stay quartered in her billet.

(f) On the eighth day of the exercise, an enlisted woman went on sick call with the diagnosis of pneumonia. She had been working long and irregular hours with less than adequate sleep.

Some unit policies, which were preferential in nature and on the surface appeared to be helpful to women, did not promote participation of women in unit activities. These policies tended to alienate men who perceived assignment based on sex as favoritism toward women. The following critical example clearly identifies this mismanagement of resources: A REF WAC 77 observer noted that women in the ambulance platoon of a medical company were unemployed or assigned trivial tasks. When queried, the company commander stated that women were not being employed in the MTOE positions because the units being supported refused to have women in the forward area. The male members of the platoon had to "take up the slack" for these nonparticipants. Nonemployment of women in forward areas was a common but erroneously based policy. Commanders widely believed that Department of the Army policy prohibits the use of women forward of brigade rear boundaries. A policy that precludes women from performing their assigned duties adversely impacts on mission accomplishment.

A major deterrent to determining female impact on unit effectiveness was that frequently there were only a few women to observe; the number of women in units ranged from one or two individuals to, at most, 10 percent of a unit's strength. Despite this small sample, observers were in agreement that the units observed could absorb women as 15 to 25 percent of their strength with no detraction from mission accomplishment. In establishing the level of male/female mix in a given unit type, the primary criterion was analysis of the unit's missions to determine the quantity and extent of tasks the unit must perform that required physical strength. Women's general lack of upper torso physical strength is the principal limiting factor in their performance of duty in the field and has a direct relation to female numbers and duties assigned for any given unit.

(2) Conclusions.

The assignment of women to a unit had no effect on the capability of the unit to fulfill its mission except in those instances where physical strength was a factor. Unit missions must be analyzed to determine the extent of physical strength required to fulfill those jobs and the male/female mix in the unit established accordingly.

b. Training for Tactical and Sustainment Tasks in the Field.

(1) Findings.

Women demonstrated a general lack of training for and knowledge of life in the field and of tactical operations. This lack of training and knowledge is detrimental to unit survivability in a combat environment. Further, it places an added burden on and causes morale problems among male members of the unit who must take up the slack in any situation where females do not carry their fair share of the load. Under current methods of warfare, no unit is completely safe from ground attack no matter how far removed from the main battle area. Enemy guerilla bands operate in the rear areas seeking opportunities to disrupt the logistics chain. As a result, every unit, combat or combat support/combat service support, must be capable of establishing a strong perimeter defense and be prepared to withstand a full-scale attack, particularly during hours of darkness. Women must be prepared to fight in these situations, operate individual and crew-served weapons effectively, as well as being able to pitch tents, dig latrines, and stand guard duty if they are to carry their fair share of the load. Failure to perform these tasks during REF WAC 77 was not always due to lack of ability. Many women made an effort to acquire the knowledge they needed. However, either the common tendency of men to be protective or male nonacceptance of females often thwarted their efforts to learn. In units where commanders insisted that each individual, men and women, carry a full share of the load in common tasks, the quality of unit performance was much higher than in units where women were protected or ignored.

The following incidents clearly identify the need for more intensive training for women in basic field duties and tactical skills.

(a) One commander expressed surprise to a REF WAC 77 observer that his supervisors had to spend so much time assisting women in field sustainment tasks. Prior to REFORGER, this commander was positive that women were a total asset to the Army. Viewing their performance, he felt that they were satisfactory in MOS-related areas in the field, but they were little help in setting up tents, camouflage, stoves, performing guard duty at night, staying warm, and keeping their living areas clean.

(b) While in the unit assembly area prior to the start of the tactical exercise, a REF WAC 77 observer asked 14 women if they would fight in combat. This informal survey resulted in 4 positive responses and 10 negative replies. The women appeared mentally to separate their performance in technical specialties from any notion of combat. They viewed their work as specialists in the Army as having no connection with combat.

(c) On the eighth day of the exercise at 0330 hours a communications center vehicle ran out of fuel during an alert. An enlisted woman stated she was afraid to go out and get fuel because of aggressor action. As a result, no communications existed for one hour.

(d) Four women made up a tent-pitching detail. Two of them got into a heated argument on how to pitch the tent. The argument lasted for some time prior to proceeding with the mission, indicating these women had not been trained properly in tent-pitching techniques.

(2) Conclusions.

Women need more instruction in coping with and participating in life in the field, to include tactical operations. Women's basic, advanced, and unit training must include the same preparatory training for life in the field that men receive. Additionally, both men and women, officer and enlisted, must be thoroughly indoctrinated from the start that all unit personnel, male and female, will share the load in the fulfillment of the common unit tasks.

c. MOS Proficiency.

(1) Findings.

Women were found highly proficient in the accomplishment of MOS tasks in both traditional and nontraditional roles. Women were highly motivated and their skills were as good or better than the males'. The one shortcoming that existed for women in MOS performance occurred in those tasks that required considerable physical strength. Even with this special selection criterion in mind, NCO data collectors identified only eight MOS's that were not recommended for women. One MOS, infantryman, is not authorized for women. Another MOS, military policeman, was not recommended for the reason that women do not possess the knowledge, experience, and training to perform tactical missions--a deficiency that can be overcome through proper training. Other MOS and tasks that the NCO data collectors on the evaluation teams believed could not be performed fully by women are as follows: 63H (tank automotive repairman); 64C (driver); 76W (petroleum supply specialist), 76X (subsistence supply specialist), 91B (medical specialist); and 94B (cook). For all of these MOS, the same basic reason was cited - women do not possess the physical strength/stamina to meet all of the physical requirements of the duties inherent in the MOS. Test Directorate assessments of female capability in all MOS found in the units observed in REF WAC 77 are found in Table B-18 Appendix B. These assessments are based on all data available to the Test Directorate as of November, 1977.

(2) Conclusions.

Women are capable of rendering a proficient performance in any combat support/combat service support unit MOS not requiring a large measure of physical strength. An evaluation of each MOS from this standpoint is in order, to establish the minimal physical requirements necessary and preclude assignment of such an MOS to women (and men) who do not meet these minimum standards.

d. Stamina and Endurance.

(1) Findings.

Analysis of performance data indicated there was little difference in the level of performance of women versus men when measured over a period of some duration. An analysis of male and female individual performance was made in terms of improving and declining trends. Female levels compared very favorably with male levels in all cases. It appeared that women could match the stamina and endurance and maintain performance standards equal to those of men in the field. Furthermore, although given poor preparation for field duty, women did learn to adapt to their new environment. The only area in which they faltered was in performing tasks that demanded upper torso physical strength that they did not possess.

(2) Conclusion.

Women possess the required levels of stamina and endurance to sustain them through an extended field operation.

e. Leadership and Management.

(1) Findings.

Leadership and management problems were widespread among the units observed and appear to be the underlying cause of most problems involving women in the Army. Many units either had policies that were protective of women or ignored women; either case was often passively accepted by the women. One REF WAC 77 team chief made the following statement that illustrates the magnitude of the leadership problem: "It was evident during the evaluation period that there is a lack of ability in the company grade officer and NCO ranks to lead effectively or motivate females operating in a sustained field environment. This stems from two factors, first, a lack of clearly defined instructions on their employment and, second, a lack of training in techniques and methods of motivating the female soldier." This mismanagement resulted in low morale in the units in which it occurred, and thus in a mediocre unit performance. Also, it created unrest among the male members of the unit who were required to perform extended periods of duty to fill in where the women were either excused or not employed. The practice of either ignoring women or protecting them, demonstrated frequently by first-line supervisors during REF WAC 77, is indicated by the following incidents.

(a) While a mess vehicle was being loaded, two female cooks sat idly in a tent because they were not assigned any duties.

(b) One women was released from hospitalization on 3 September and was not picked up by her unit until 7 September.

(c) During a unit alert, off-duty women sleeping in a separate tent were not called to defend the perimeter.

(d) A woman stated that women often sleep through guard duty tours with no repercussions and often they were not informed of the duty.

(e) A woman requested assistance from her supervisor in setting up a shelter half. The supervisor did not respond in any manner, but merely walked away.

(f) Four women sat in a tent upon arrival in a new area, not assisting anywhere because they were told they were in the way.

(g) One supervisor stated that the women on his team and other teams refused to change or service generators at night because they were afraid of the dark. As a result, the men on the various teams had to do the work that the women refused to perform, thus creating low morale among the men. The supervisor overcame the obstacle by accommodation, rather than by analyzing the problem, demonstrating his need for training in the management of women. The units in which all personnel, male and female, were required to carry the same load demonstrated much higher levels of unit performance, morale, and esprit.

(2) Conclusions.

Army leadership training must be expanded to include the methods and techniques for motivating the female soldier. Leaders at all levels in the chain of command must be taught that women in the Army are an integral part of the team and they are expected to carry out all duties commensurate with their rank and job assignment. Instruction in this important facet of leadership is appropriate for service schools, training centers, and unit officer and NCO classes.

f. Bias Against Women.

(1) Findings.

Descending the chain of command from battalion level to that of immediate supervisor, opposition to women in the unit increased. Generally speaking, senior officers, who were farthest removed from the problem, fully accepted women, junior officers appeared indifferent to the problem, and "old soldier" NCO's were openly opposed in word and action. Although NCO's generally admitted that women can perform well in their tasks, most NCO's just do not want them around. This NCO attitude is clearly evidenced in these incidents that occurred during REF WAC 77.

(a) During the course of the field exercise, a female soldier's ability to read a map was challenged by an equal-ranking male. The female had demonstrated satisfactory ability to read a map on two previous occasions as the senior individual in a vehicle. In both instances, she reached her destination in an acceptable manner. On this mission, the male insisted she was in error. As a result the mission failed due to excessive time as the male repeatedly read the map incorrectly. This man was convinced in his bias against females in nontraditional roles that a woman could not possibly read a map.

(b) A platoon sergeant instructed a male sergeant to assist some women in taking down their tent. The sergeant responded by pulling up tent pegs while the women were still in the tent, until he was told to stop and let the women do the work themselves. The sergeant saw this as an ideal opportunity to harass an "undesirable" element (women) in the unit. This one incident probably best documents the real crux of resistance to female integration in the Army. The sergeant was following an order, and he simply did not want women in "his" Army. Female competence was not at issue.

(c) During the course of the exercise, a supervisor related to a REF WAC 77 observer an incident that occurred the previous day. A female enlisted member dropped an engine, pinning her leg, and the supervisor with some disgust had to run to her aid. He felt he was a babysitter and was convinced that women cannot perform adequately with heavy equipment. He also expressed the opinion that this woman would be no better working in an office. His mind had been made up that women are a bother in "his" Army.

(2) Conclusions.

Strong opposition exists at company level and below to the assignment of women to combat support/combat service support units. An Army-wide education program is required that stresses management and employment of women in a positive theme, which underscores the value and importance of women in the Army.

g. Field Clothing for Women.

(1) Findings.

Over 100 female service members were interviewed during REFORGER and questioned on the suitability of female clothing and equipment. None of the women interviewed felt the clothing and organizational field equipment issued to women were adequate for field duty. The chief complaints were that fatigues were not wash-and-wear, were too lightweight to provide adequate warmth, and were ill-fitting. Women's field jackets provided little warmth in 30° temperatures and were discarded in favor of men's field jackets. The women also used male overshoes since there was an inadequate supply of female overshoes. The structure of women's combat boots was not sturdy enough to withstand the rigors of an extended period in the field. The web gear and load-bearing equipment were not designed for the weight-bearing capabilities of women. The suspenders of the load-bearing equipment placed pressure directly on the breast and exerted an abnormal amount of pull across the shoulders and neck. The equipment was very uncomfortable to women especially when used over an extended period of time in the field. Also, gloves and field jacket liners were not made in sizes small enough for women. A shortage of these items had an adverse impact on the comfort, appearance, and morale of female service members.

(2) Conclusion.

A requirement exists for the development of field clothing and equipment for women that can provide them the needed protection and comfort for an extended period of field duty.

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h. **Female Field Health and Sanitation.**

(1) Findings.

Health and sanitation provided for women during REF WAC 77 proved inadequate. The great distance and infrequency of visits to shower points were a source of major complaint among the women. They found helmet baths unsatisfactory and voiced a desire for more frequent trips to the shower point. This requirement for frequent showering received support from the medical observers who verified that, gynecologically speaking, a woman has a greater need for more frequent attention to body cleanliness than a man. For similar reasons, pit type latrines were not satisfactory for women, who sought other sources for relief. They expressed the added concern of possible assault while visiting a darkened latrine site some distance from their billet, although no such attack was ever reported. It was also noted during REF WAC 77 that field medical facilities were not equipped to attend to female-related disorders as evidenced by the following medical shortfalls:

(a) No obstetrician-gynecologist was available within the 1st Infantry Division, nor was one authorized.

(b) Initial planning failed to include particular female medications in the basic drug list.

(c) No vaginal speculums were available within the Division medical elements.

(d) No examination tables with stirrups were available for examining women, nor did the combat support hospital have examining tables equipped with stirrups.

The above list does not identify the full extent of the problems associated with the health care requirements of a large number of women on extended field duty. It does, however, indicate a problem exists that requires special consideration. Since this medical capability was lacking, female-oriented medical problems were necessarily referred to a base hospital some distance from the maneuver site.

(2) Conclusions.

Requirements exist for the development of field health and sanitation policies and procedures and for the provision of field medical facilities, drugs, instruments, and personnel that more adequately respond to the special health care requirements of women.

i. **Female Leadership.**

(1) Findings.

The number of female leaders, officer and NCO, participating in REF WAC 77, was so small that fully supportive findings could not be made. Observers did note isolated incidents in which female leaders either had no concept of how to exercise their authority, or abused that authority. Female leaders were also noted to be lacking in tactical training. Additionally, there were occasions when women experienced difficulty in gaining acceptance as leaders. Their authority was ignored by men who would not accept women regardless of their demonstrated competence. The following incidents exemplify the above:

(a) A female platoon leader constantly exhibited poor leadership and contributed to or was the cause of low morale in her platoon. She could not or would not control her attitude toward the Army or her people in their presence. She demonstrated little respect for her enlisted personnel and gave little guidance to her NCO's. As a result, missions were performed without enthusiasm and morale was low.

(b) A male automotive warrant officer indicated to a REF WAC 77 observer that female NCO's "may not be able to handle the troops." This warrant officer's comment was purely speculative for there were no female NCO's in his technical field at the time, and he had no previous experience with female leaders. The lack of confidence in women expressed by this individual is indicative of male bias against female leadership in a nontraditional area.

(2) Conclusion.

The above observations provide further support for the requirement for improved tactical and leadership training for women as well as an Army-wide education program in support of women in the Army.

j. Female Migrations from Nontraditional Specialties.

(1) Findings.

Of the 229 women participating in REFORGER, 49 were working in an MOS other than their own. Of these, 17 had migrated from a nontraditional MOS to traditional specialties, while three had shifted from traditional to nontraditional specialties. Two women with nontraditional MOS were serving in other nontraditional MOS. The remaining 27, trained in traditional MOS, had migrated to other traditional MOS.

(2) Conclusions.

Slightly over seven percent (7.4%) of the females participating in REFORGER had migrated from nontraditional to traditional assignments.

k. Female Content in Units.

(1) Findings.

(a) Information was obtained from 108 first-line supervisors, 60 unit leaders, 25 observer team members, and 19 NCO data collectors. Their recommendations were taken on proportions of women to be utilized in the combat support/combat service support units under observation. This information concerned male-female ratios by MOS, team, section, platoon, and company. The information reflected both command policies and individual biases in real units in the REFORGER situation, leading to wide variations among the separate units. Illustrations of these variations are found in the reports of the chiefs of the signal and transportation teams. The signal team chief recommended, based on female strength limitation and current tactical proficiency, that no women be assigned to signal letter companies. The transportation team chief recommended, at the other end of the spectrum, the assignment of women in percentages up to 50 percent.

(b) The REF WAC Test Directorate subjectively analyzed this information in the context of observations on REFORGER, taking into consideration tactical and sustainment requirements, to develop recommended upper limits for female content in the observed units. Observations and considerations in deriving these upper limits include:

(1) The current level of tactical training among women observed on REFORGER was well below that of men.

(2) Companies with a high female density would encounter difficulties in operations such as perimeter defense, reaction force, local patrolling, rear area protection (MP units) and interior guard.

(3) The primary rationale used in arriving at recommendations on female content in units is unit proximity to probable combat areas. Units operating in the division rear area could, under this concept, accept a higher female density than a unit operating habitually forward of the brigade rear boundary. An additional consideration was given to the factor of sustainment.

(4) Unit sustainment tasks requiring team efforts in heavy lifting, digging, or hauling over an extended period of time could have an adverse effect on a company with a high female density.

(2) Conclusions.

The REF WAC 77 Test Directorate recommends that the upper limit of female content in the subject combat support/combat service support units be as follows:

UNIT	AUTHORIZED STRENGTH	MAXIMUM FEMALE CONTENT	PERCENT
Maintenance Battalion (MTOE 29-26)			
Headquarters and Light Company	113	29	25
B Company	211	53	25
C Company	173	26	15
Medical Battalion (MTOE 8-37)			
Headquarters and A Company	138	35	25
C Company	76	19	25
Military Police Company (MTOE 19-37H)			
MP Company	166	26	15
Signal Battalion (MTOE 11-37)			
HHC	96	24	25
A Company	204	51	25
B Company	123	18	15
C Company	153	38	25
Transportation Battalion (MTOE 29-65H)			
HHC	49	12	25
A Company	140	35	15
B Company	183	46	15

4. FUTURE REQUIREMENTS.

a. REFORGER 1978.

(1) The military observers for REF WAC 77 do not recommend a repeat of the experiment for REFORGER 78. It is their belief that sufficient data were obtained during REFORGER 77 to offset the requirement for similar testing in 1978. There would be justification for repeating the experiment in 1978 if positive corrective action were taken on all the REF WAC 77 findings, e.g., female clothing, sanitation, health care, improved training of EW before the scheduled date of REFORGER 78, permitting the testing of innovations effected by this corrective action. If the corrective action is not accomplished by the date for REFORGER 78, then further tests certainly should be conducted at some future date to determine the effects, good or bad, of the corrective action taken based on the results of REF WAC 77.

(2) If the experiment is repeated in 1978, and maximum benefit is to be gained, it is imperative that the test sample of women be greatly

increased in number. Also observers must have detailed advance knowledge of the scenario for the organization under study so they can plan for optimum coverage of the female participation.

(3) Recommended changes include:

(a) Predetermined AIT graduate fills of both male and female soldiers in exercise units.

(b) Organization, stabilization and pre-exercise training.

(c) Controlled deployment.

(d) Insertion of exercise-compatible scoring events on a limited basis.

Concept for Future Testing.

) Concept.

This concept calls for the controlled fill, organization, stabilization, training, and testing of teams and sections of the selected units. The research effort would be conducted over a 6- to 9-month period in five phases.

(a) Phase 1. DA would identify five CONUS divisions having combat support and combat service support units similar to those observed during REF WAC 77. Each of the divisions would accept a fill of male and female AIT graduates in one of the five branch areas evaluated in REF WAC 77 (maintenance, medical, military police, signal, and supply and transportation).

(b) Phase 2. Divisions would organize, stabilize, and train male and female AIT graduates in team/section mixes recommended by the REF WAC 77 study. Control team/sections which are all male, would be similarly organized and trained.

(c) Phase 3. A small test directorate would be established under DCSPER. The directorate would place monitors at each division location to observe the organization, stabilization, and training of the units.

(d) Phase 4. The directorate, augmented with personnel and equipment assets from each participating division, would test individual MOS proficiency using skill qualification tests and unit proficiency using the standard applicable ARTEPs under highly controlled conditions. Testing could be accomplished in 48 to 72 hours.

(e) Phase 5. Evaluation and reporting of test results would include a comparative analysis between test and control units and a further comparison of these results with REF WAC 77 findings by team and section in each branch area.

(2) Advantages.

The REF WAC 77 Military Test Directorate concept for future testing offers several distinct advantages.

(a) The concept is flexible in scope and can be limited or expanded as desired in terms of numbers and types of team and sections to be evaluated.

(b) The research effort can be accomplished exclusively in CONUS.

(c) This research effort need not be linked to scheduled exercises.

(d) Because the research staff can be relatively small and assets to support the effort can be locally furnished, fund expenditures would be modest.

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PART V

INTERVIEWS WITH ENLISTED WOMEN PARTICIPANTS AND NCO DATA COLLECTORS

1. INTERVIEWS WITH SELECTED ENLISTED WOMEN PARTICIPANTS

a. Introduction.

Approximately two months after the completion of REFORGER 77, ARI conducted interviews at Ft Riley with 40 EW who had taken part in the exercise. These 40 EW previously had been identified as the best and the poorest EW performers on the field-exercise portion of REFORGER. The identification was indicated by the average of the daily performance ratings given them by their immediate supervisor(s) in the field, using a 7-point scale. This scale is described in Part II of this report. The women selected for interviewing were the 20 with the highest average daily performance ratings (range: 6.7 to 7.0) and the 20 with the lowest average ratings (range: 3.7 to 5.1). The purposes of these interviews were (1) to identify background characteristics, e.g., prior Army experiences which might be useful in the future in trying to predict quality of performance in a field exercise, and (2) to obtain additional information about REFORGER 77. (See Appendix A, pp. A-128, 129.)

b. Pre-Army Experiences and Performance.

It was hypothesized that the performance of women on REFORGER would be related to previous field experience in the Army or outdoor experience prior to the Army. As such, the high performers likely would have had more pre-Army experiences with camping and hiking, as well as other outdoor activities. This expectation, however, was not supported by the interviews. In fact, more low than high performers said they had had pre-Army camping experience and that they had been known as "tomboys" while growing up.

Further querying of the women about pre-Army factors which might have influenced their ability to perform on Army field exercises was not fruitful. There was virtual unanimity among the respondents in their inability to recollect any such pre-Army experiences.

c. Army Experiences and Performance.

The interviews also failed to support the contention that field performance on REFORGER would be related to previous field experience in the Army. There was little difference between high and low performers in terms of previous Army field experience.

While previous camping or field experience was apparently unrelated to performance during REFORGER 77, prior experience with the particular job performed during REFORGER was possibly related to performance. An examination of MOS-mismatch (defined as not working in one's PMOS) showed was no difference between low and high performers on this dimension. Further probing of the women, however, uncovered a potential reason why some women performed more poorly than others on REFORGER 77. Six of the 20 low performers (30 percent) noted that while they had worked in their PMOS during REFORGER 77, REFORGER marked the first time they had worked in their PMOS since Advanced Individual Training (AIT). Had they been participating in their PMOS while in garrison prior to REFORGER 77, the women felt they would have been able to perform better during the field exercise. As a matter of fact, some women indicated that their MOS performance improved during REFORGER as they reacquainted themselves with their PMOS. The above point is further reinforced by the fact that no high performer mentioned assignment to another MOS immediately preceding REFORGER 77.

One female mechanic felt that her MOS performance was more difficult in the field, away from the job aids she had in the motor pool. However, there was a paucity of such comments. The overwhelming majority of women did not indicate that job performance was more difficult in the field than in garrison.

d. Performance of Women Relative to Men.

The respondents were asked to compare their own performance to men in the same paygrade and MOS. In general the women felt that their performance was equal to that of their male counterparts. However, some dissatisfaction was expressed over supervisory staffing strategies. Some women perceived that supervisors had a proclivity, when confronted with a sex choice (especially for tasks requiring above-normal amounts of physical strength), to select a male to accomplish the task. This indicated to them that supervisors regarded performance abilities of men as higher than women in many field tasks. This was a source of discontent for many women who did not feel inferior to men in terms of job performance ability.

e. Adjustment to the Field.

Most respondents felt that they were able to adjust adequately to working in the field. There were numerous complaints regarding the sanitary conditions. These complaints focused primarily on the low frequency of showers, the lack of clean latrines, and, in some cases, the fact that the latrines had to be shared with men.

Also, some concern was expressed by women over their safety while walking 100 or more yards from their tents to the latrines at night. Despite their concern with potential assaults, the women agreed that the male soldiers in their own units did not demonstrate excessive sexual aggressiveness toward them during the field exercise. In fact, if anything, the men in their units shielded them from the undesirable advances of men from other units.

One problem the women agreed upon regarding adjustment to the field was that of clothing. The weather in Germany during REFORGER 77 was cool, particularly in the forest. The women said that their fatigues were too thin to afford the necessary protection from the cold. They reported that their own informal comparisons of men's and women's fatigues indicated that the men's fatigues were substantially superior. They recommended that the women's fatigues be improved.

It is important here to distinguish between performance and adjustment. While previous field experience appeared unrelated to quality of performance during the field exercise, the interviews suggested that past field experience did aid adjustment to the field. Many women indicated that their ability to cope adequately with field conditions was enhanced because, from previous field exercises, they knew what to expect. The women, in general, did not feel that adjustment for them was any more difficult than for the men. As one woman noted "they (the men) worked in the same field we did."

f. Leadership and Authority Issues.

The women were questioned as to any leadership or training problems that may have impacted on their performance during REFORGER 77. In general, the women could not identify specific problems in training or leadership, except the lack of sufficient PMOS experience and supervisory staffing procedures.

With regard to the whole question of the authority system within the Army, virtually no woman felt compelled to attack the system. Most were quite willing to take or give orders. However, the women felt that they had a right to ask questions related to orders to determine their purpose. The women also indicated sensitivity as to whether supervisors gave orders in order to accomplish an Army mission, or simply to demonstrate their own authority. There was no basis for determining if these female concerns differed from those of their male peers.

g. Summary.

In general the women interviewed at Fort Riley who took part in REFORGER 77 indicated that they were able to adjust and perform satisfactorily under extended field conditions. They felt that their adjustment and performance were equal to the men. Among the women, the primary factor which distinguished the high performers from the low was prior Army experience with MOS-related tasks performed during REFORGER. A number of the lower performers alleged that they did not have very much prior experience in performing the MOS-related tasks they were called on to perform during REFORGER.

2. INTERVIEWS WITH NCO DATA COLLECTORS

a. Overall Impression of Enlisted Women Performance.

ARI conducted interviews with the NCO data collectors shortly after REFORGER was completed. Some of these interviews were conducted in USAREUR, but most were conducted in Alexandria, VA. Two general impressions arose from reading reports of the interviews with the NCO data collectors. One impression on which there was almost complete agreement was that the effectiveness of the units observed did not suffer as a result of having had women assigned to them. The other impression which did not have complete agreement was that the women, as individuals, did not perform as well as the men on certain tasks. One type of task, that some NCO's said had not been performed as well by the women as by the men, called for physical strength e.g., changing a tire on a 2 1/2 ton truck or lifting a 5-gallon gasoline can. In part, the question is simply whether an individual woman has the strength or not to perform the tasks. In part, however, the question is also whether the (primarily male) supervisors think the women can perform them. Rather consistently, women gave many more favorable opinion of what they could do than the men gave. [Many women reported either that they were not asked to perform certain tasks or they avoided them by asking (even with insufficient justification) not to be required to perform them.] Without further research, therefore, it is not possible to say how much of the alleged inability of the women to perform some tasks was an actual inability and how much of it was not. In any event, when a supervisor considered a particular task too demanding physically for an EW to perform, he would usually assign the task to an EM. When this happened, some of the men would complain while others felt that they ought to help the women with these tasks. (See Appendix A, page A-127.)

The other type of task which (according to some of these NCO's) was not performed as well by the women as by the men was the type of task that calls for special field training and experience, e.g., pitching a tent or lighting a stove to use in heating the tent. It was the opinion of the NCO's that many of the women hadn't been given adequate training, e.g., in BCT/AIT. Some NCO's said the women were insufficiently trained in how to carry out various tasks that go into an extended field exercise and that, prior to REFORGER, little or no effort was made to compensate for this inadequacy. It is thus understandable that, out in the field, many supervisors preferred to assign such tasks to men rather than take the time required to teach the women how to perform them.

b. Recommendations for Improving Data Quality.

The data collectors provided a number of suggestions for improving future data collections of the same general type. The suggestions can be classified into (1) selection of data collectors, (2) training, and (3) housing and transportation in the field.

(1) Selection of Data Collectors.

A number of data collectors suggested that future data collectors hould be chosen on a voluntary basis. A data collector should be the same Career Management Field as the soldiers in the unit observed. inally, data collectors should be screened by ARI to insure that they re properly qualified. There was no consensus about whether those data llectors should be enlisted personnel (E5 and above) or officers.

(2) Training of Data Collectors.

The data collectors agreed that they needed more training han they had received if they are to perform satisfactorily. The raining should focus on the general purpose of the overall research ffort, the particular purposes of the data collectors' mission, and the echanics for collecting the data, e.g., how to fill out the forms.

(3) Housing and Transportation.

Most of the NCO data collectors indicated dissatisfaction with ousing arrangements in the field. They felt that they needed their own P small tent, equipped with a table and some type of lighting, so that hey could do the paperwork that goes with the data collection. A umber of data collectors also complained about the transportation rrangements. In many cases they were as they put it, "at the mercy" of the units they were observing. In other words, they often wanted to ollect data at one place while the vehicle necessary to transport them to that place was elsewhere. As a result, some of the data they considered seful for evaluating the exercise was not gathered.

PART VI

INTEGRATED DISCUSSION, CONCLUSIONS, AND RECOMMENDATIONS

1. SCOPE OF PART VI

Observations and the results of analyses of more objective data have been reported in the preceding parts of this report. An integration of these findings in the context of the total ARI research effort will be attempted in Part VI. The discussion will include the identification of shortcomings of the research to date. The reservations of the ARI scientific staff, in extrapolating results to situations and conditions not in REF WAC, will be explained. The operational implications of ARI research conclusions will be discussed and recommendations for future investigations provided.

2. PLACING REF WAC IN CONTEXT

a. The Management Milieu.

The REF WAC research effort parallels with other investigations and management studies, all planned as input for management decisions that have to be made in the Spring of 1978. The decisions relate to optimal numbers and utilization of female soldiers for an effective Army having personnel policies reflecting the will of the American people. Thus, long-range plans for accessioning women into the Army over the next several years will be determined.

One parallel investigation will provide recommendations, based on individual performance tests, as to whether certain MOS tasks can be performed adequately by female soldiers. Where appropriate, the investigation will calculate the cost of modifying tools and/or equipment to permit the utilization of more women. Another parallel investigation will provide recommendations as to the suitability of women for every

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Army MOS. Survey data provided by military experts and career progression considerations will enter into these recommendations. Several coordinated investigations will provide physical strength tests by late 1978 for possible experimental use in a gender-free selection and assignment system at a still later date.

The REF WAC results provide the best available information on performance of female soldiers in an extended field situation, as contrasted with performance in garrison type duties. Divisional support companies almost always will have installation support missions which do not necessarily mirror their mission of supporting combat brigades on a battlefield. Therefore, the careful distinction between garrison and field missions of support units is essential. Failure to separate the two missions is equivalent to confusing the parade and fighting functions of combat arms troops.

b. MAX WAC Compared to REF WAC.

From summer 1976 thru spring 1977, ARI, augmented by 23 officers and several enlisted soldiers, conducted the force development test "Maximum Women Army Content," (MAX WAC). The goal was to determine the effect of different percentages of female soldiers on unit performance in a 72-hour ARTEP exercise. A total of 40 companies was observed in 55 field exercises with 15 companies undergoing both a fall and a spring MAX WAC ARTEP. Final report on this test was provided in October 1977. MAX WAC performance and questionnaire data supported a conclusion that the addition of up to 35% women had a negligible impact on unit performance during an intensive three-day field exercise for the type of companies tested (maintenance, medical, military police, signal, and supply and transportation). However, the shortness of the 72-hour ARTEP, tentative evidence that female soldiers were more likely than men to be left behind when a support company went into the field, and the lack of data on the performance of mixed gender platoons, sections, or teams, led managers to feel that more data were required before safely assuming that field performance, in general, was not affected by unit content of women (up to 35%).

The inherent characteristics of REF WAC, as compared to MAX WAC, are summarized in Table VI-1.

Table VI-1

CHARACTERISTICS OF REF WAC COMPARED WITH MAX WAC

1. Tasks determined by targets of opportunity; MAX WAC - Tasks evoked by standard scenarios.
2. Ratings obtained by platoon/section; MAX WAC - Scores obtained by company.
3. Tasks rated several times during FTX; MAX WAC - Tasks scored once during ARTEP.
4. Units observed during 3-Week field deployment; FTX; MAX WAC - units observed during 72-hour ARTEP.
5. Content of women up to 10% (TRADOC limit); MAX WAC - Content of women up to 35%.
6. Weather and terrain comparable for most observations; MAX WAC - Units observed over a wide range of weather and terrain.

In many ways, MAX WAC and REF WAC were quite similar. For example, both involved the collection of performance scores of units or groups and questionnaire responses of soldiers. Both required establishment of a military test directorate to provide the expert raters for scoring field performance.

The first comparison in Table VI-1 contrasts ARTEP tasks elicited by a standard MAX WAC scenario specific to each type of company with the requirement for REF WAC officer evaluators to select tasks to rate as targets of opportunity. In REFORGER 77, if the overall CARBON EDGE scenario and its tactical implementation by the maneuver units did not require specific tactical events, such as for a support unit to defend its perimeter or to react to an ambush while on a road march, then performance on such tactical events could not be rated. Similarly, if exercise participants placed only negligible requirements on a medical unit to care for sick and injured soldiers, there was no work load simulation and the medical unit did not perform many of the tasks required in an ARTEP scenario. Only about one third of the units observed as part of REF WAC changed locations during the CARBON EDGE exercise, while one or more moves were built into every MAX WAC scenario. Apart from the availability of tasks to rate under noninterference rules, the conditions except for weather and terrain, were much more variable and thus less comparable than in MAX WAC. There, each event had a specific place in the scenario and was carefully defined.

A major deficiency of MAX WAC scoring procedures for some types of companies was that the team or group engaged in tasks (comparable to group event ratings) could not always clearly be determined. Thus a task score could not be attributed to a group of a known gender mix. Only the number of women in the unit as a whole could be associated with a task score.

Nor was it possible to compare task scores across the first and second MAX WAC ARTEP (for twice-tested companies). The first ARTEP was scored by local evaluators in addition to (and quite independently of) the MAX WAC officer evaluators. It can be presumed that poorly performed tasks were identified to the company commander (per TRADOC doctrine) to receive greater emphasis in company training. Thus, if training were applied correctly to the tasks most in need of remedial attention, as identified by the local evaluators on the first ARTEP, the second ARTEP should show an entirely different set of tasks as most in need of further training. Obviously, ARTEPs could not be compared, task by task, across two successive ARTEP presentations: comparison of task scores across two successive ARTEPs for the same company would provide a spuriously low estimate of test-retest reliability.

REF WAC tasks (group event ratings) legitimately could be compared across one or more performances during CARBON EDGE without fear that rating modules in themselves would affect future performances. Thus group event ratings could be used whereas only the aggregated event scores i.e., total company scores, could be appropriately utilized in MAX WAC. MAX WAC events were given a single score for a company even though an event such as an ambush, might have occurred more than once in a single ARTEP. In REF WAC, each instance of performance received a separate score, thus permitting a comparison of performance over time.

The opportunity to compare units with a varying number of women in the units observed in MAX WAC is clearly resolved in favor of MAX WAC which had controlled fills up to 35%. Also, some MAX WAC company types were Corps units and thus fillable to 20% women under the limit recommended to DA by TRADOC. All CONUS-based REF WAC units had a TRADOC limir of 10%. Although most units were filled almost to this limit, DA directive to the unit commanders prevented them from leaving more women than men at home. Members of the male cohort selected at Fort Riley were often assigned to FAST or Contact teams during CARBON EDGE. This action greatly restricted the opportunity to compare performance of the male soldiers to matching females, who were seldom placed on these teams that normally operated forward of the brigade rear boundary.

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The emphasis on team/group evaluation in REF WAC and the fairly even distribution of women across the support companies that contained women made the distribution of women in the groups within the companies of critical importance. The REF WAC research design would have been facilitated by an assignment policy that concentrated women into a few groups, leaving other groups all male. The availability of mixed gender groups to compare with all-male groups, so essential to the REF WAC approach, depended as much on an uneven distribution of the women as on the total number of women in the company.

c. Limitations on the Generalizability of REF WAC Results.

The value of REF WAC results is necessarily limited by the characteristics of REFORGER 77: the number of female soldiers present; the existing weather and terrain conditions; and the kind of tasks and functions women were required to perform. The noninterference rule meant that standard events could not be generated for rating purposes; that work loads could not be simulated where natural work loads were so light as to limit observational opportunities; and that the variety of observable tasks could not be artifically increased.

Only one-third of the companies that might have been expected to change locations during CARBON EDGE actually moved one or more times. The weather was relatively mild during the actual exercise although in the pine forests where most encampments were placed it was frequently too cold for the comfort of female soldiers who relied on standard issue apparel. It is difficult to predict how well the many women who complained of the cold would have fared if REFORGER 77 had been held midwinter in a colder region. The women may well have complained less if they had been adequately equipped with cold weather gear.

Also, as in MAX WAC, the female soldiers in REF WAC were observed as relatively untrained in tactical and sustenance skills. Whether this finding would occur again in future REFORGERS would be difficult to predict. The new basic training and the increased expectation that women will participate in field exercises will undoubtedly prepare female soldiers to work and survive better in the field than was true of REFORGER 77.

d. Comparison of MAX WAC and REF WAC Objectives.

The MAX WAC Force Development Test had a comparatively simple research purpose and objective, since this effort was initiated to validate unit limits for women as established by TRADOC. An Outline Test Plan (OTP) was prepared by ARI and used for coordination with OTEA, FORSCOM, TRADOC, Health Services Command and several Army Headquarters elements outside of DCSPER. Coordination and approval of the OTP by TSARC established the approach and troop resources to support MAX WAC. The expanded objectives in HQDA LTR 70-76-8 dated 9 November 1976 could not impact on the available resources, field coordination, or research design for MAX WAC. No corresponding change in the OTP could be presented to TSARC for their approval until after most field data was collected. The purpose and objectives of MAX WAC as described in the OTP were as follows:

> "PURPOSE: To assess the effects of varying the percentage of female soldiers assigned to representative types of Category II and Category III TOE Units on the capability of a unit to perform its TOE Mission under field conditions.
>
> "OBJECTIVE: To provide empirical data to test the null hypothesis that specified increases in the proportion of women in selected TOE Units will not impair unit performance. The design and the quality and quantity of data must assure that obtained differences large enough to have practical significance will have statistical significance as well."

Shortly after the HQDA LTR was issued, DA policy makers began to emphasize the need for hard data on the impact of female soldiers by "skill and grade." In the eyes of many potential users of MAX WAC results, this requirement was added to the expanded list of management objectives provided by the above letter as a hoped-for output of MAX WAC. Unfortunately, MAX WAC had not collected the kind of data which would make this possible. MAX WAC test results could not provide a firm basis on which the Army could make its decision regarding the optimum level of female soldiers in the Army. Data were provided for decision-makers only as to the impact that up to 35% women would have during three-day exercises.

The HQDA LTR, dated 27 June 1977 establishing REF WAC, incorporated as much of the managerial requirements unmet by MAX WAC as appeared compatible with the noninterference, short-leadtime utilization of REFORGER 77 as the research vehicle for REF WAC.

e. Comparison of Extraneous, Uncontrolled Factors in MAX WAC and REF WAC.

An independent review of the MAX WAC effort, provided by another Army agency, started during the closing weeks of data collection and pointed out a large number of uncontrolled factors that could affect performance scores. Most of these factors could have influenced results only by reducing the expected performance of units taking their ARTEPs a second time (with increased number of women) as compared to the first time. Thus to the extent these uncontrolled factors were present and affecting results, they were biasing results in the direction of more frequently impaired performance for units with an increased number of women than would be expected to occur otherwise. Some of these factors would not affect REF WAC results, since they related to such things as the controlled fills and differences in command emphasis attached to first and second ARTEPs that did not occur in REF WAC. However, some factors would affect both investigations. For example, the female soldiers of both MAX WAC and REF WAC were the products of the old basic training program that could not have been expected to prepare women fully for service in combat support and combat service support companies.

REF WAC and all other on-the-job comparisons of male and female performance in support units conducted on existing populations are also subject to the criticism that female soldiers in support units are not well-matched to their "same-rank" counterparts in the matching male cohort on age, experience, and intelligence. The difficulty in achieving a good match was due in part to female soldiers in support units tending to have had less experience in support companies. This lack of experience is correlated negatively with performance, while the higher academic aptitude of females (as measured by GT scores) is correlated positively with performance. As more women come into the Army, the relationships of age, experience, and intelligence with gender cannot be assumed to remain the same. There will be more female graduates of the new basic training course, and female educational and test entry standards might possibly be lowered to become comparable to male standards. Hence, REF WAC conclusions emerging from results obtained under today's conditions will require revalidation.

1. INTEGRATION OF PART III AND PART V RESULTS WITH TEST DIRECTORATE FINDINGS AND RECOMMENDATIONS IN PART IV

a. Findings Related to the Primary REF WAC Objective.

Test Directorate findings will be quoted from the Test Directorate's military report and followed by a discussion of other findings. Most of these other findings were obtained after the writing of the military report and are based on statistical analysis of data, a review of interview data, or other REF WAC or MAX WAC information. All quotation marks indicate the military report as a source. A final integrated conclusion will be provided in each case.

(1) Impact of Women on Group Effectiveness.

"Women in units observed had little or no adverse impact on unit effectiveness or mission accomplishment." Very few statistically significant differences were found between the performance of all-male and mixed (including all-female) groups on group event rating modules. For the relatively small number of group event rating modules on which all-male and mixed groups could be paired and their performance evaluated over two or more of the three exercise time periods, mixed groups showed superior performance to matching all-male groups during both the beginning and middle time periods; and both male and mixed groups showed a statistically significant improvement in performance in the middle period as compared with the first period. These results are by no means conclusive because the events on which these results were based represented a small part of the total number of events on which data were collected. One could argue that these events were not representative of the total set of group event rating modules. When the data on all group events occurring in the high stress companies were considered without restricting comparisons between male and mixed groups to those that could be made on the same group event rating modules, the overall average performance of mixed groups exceeded that of all-male groups but the difference was not statistically significant. A similar comparison across all companies, regardless of amount of stress, showed overall performance of male and mixed groups to be essentially equal with a very slight, statistically nonsignificant, advantage accruing to the mixed groups. Dividing this total population of events along different lines--into common (tactical and sustenance) tasks versus tasks unique to each company type--showed an overall slight, but not statistically significant, superiority of mixed groups over all-male groups for the common tasks (events), and a smaller superiority of mixed groups over all-male groups for the unique tasks (events).

Note that the events were not of equal difficulty. Making comparisons on all event ratings without first matching groups on event rating modules would distort the results in favor of the gender category that happened to receive the easier assignments. This consideration may will explain the small superiority attained by the mixed gender groups--or this difference may well be the result of chance fluctuations. The only safe conclusion is not that mixed groups performed slightly better than all-male groups, but that the above conclusion of the Test Directorate is in fact strongly supported by the REF WAC analyses of group event module ratings.

Other performance data based on daily performance ratings of individuals by supervisors also supported the above finding that no important effects on unit performance were due to the presence of female soldiers, but these results are related more directly to other findings and will be discussed elsewhere. The overall integrated conclusion is that the presence of female soldiers on REFORGER did not impair the mission performance of the support units observed on REFORGER when mission is defined in terms of the REFORGER 77 scenario.

(2) Tactical Skills.

"Women observed were not as well trained in tactical skills as men. ....It should be noted that none of the women observed was the product of the new basic training....Recommendaton: Increase the intensity of tactical training of women during both basic and subsequent unit training." Questionnaire data supported the Test Directorate finding in showing that officers, NCO's, and EM thought that enlisted men performed better than women on tactical and sustenance tasks as well as on MOS-related tasks. Also, the majority of male soldiers and almost half of the female soldiers believed that most women would do almost anything to avoid going into combat with their units. This reluctance may well reflect the self-perception of EW that they have not received adequate training in tactical skills. When individual event rating modules (tasks) were considered separately for common (tactical and sustenance) tasks and unique (MOS-oriented) tasks, female soldiers received a slightly higher average rating than male soldiers for unique tasks and male soldiers performed a little better on common tasks. The difference beteen men and women in one time period (pre-FTX, common tasks) was statistically significant with the direction of difference supporting the above finding. No statistically significant difference continued into the later time periods. Overall, the quantitative data add little in either support or contradiction of the Test Directorate finding.

(3) MOS Proficienty

"Women observed were highly proficient in MOS tasks. This finding is equally true with respect to traditional and nontraditional roles. Women demonstrated a strong motivation to improve in MOS skills and noticeably increased in job proficiency during the exercise. ....Initially women observed were not as well prepared as men for field duty and did not fully know what to expect. Preparatory instructions on field duty may not have been adequate; given the amount of experience women have had in the field women did adapt, remarkably fast and well to field duty." This finding was strongly supported by the results of comparing the average supervisory ratings of male and female soldiers in the six highly stressed companies (i.e., moved one or more times and had some adverse conditions indicated on rating module forms) across beginning and end time periods. The statistical significance (at the .01 level) of the analysis of variance F-test of the interaction of the three factors of gender, high stress vs low stress, and time period, can be attributed to the lower initial rating of female soldiers in high stress companies during the first time period. Thus the differences indicated in Table VI-2 can be said to have statistical significance.

Table VI-2

AVERAGE DAILY SUPERVISORY PERFORMANCE RATINGS IN HIGH STRESS COMPANIES

Cohort	Time Period	
	Begin	End
Male	6.1	6.1
Female	5.7	6.1

These results, based on members of the male and female cohorts who had ratings for all three time periods, showed women receiving initially poorer ratings, possibly because of effects similar to culture shock, but recovering to receive ratings equal to that of the men during the last three days of the exercise. The comparison of ratings of all men and women, for both high and low stress companies, without eliminating the incomplete data cases, showed an increase in effectiveness over time for both sexes. However, there was no difference between the average performance ratings for men and women.

As mentioned under the finding above, there was a statistically significant increase of average group event ratings for both men and women from the first to the middle period with mixed groups retaining their statistically significant superiority in both periods. In addition, the self-assessment of female soldiers obtained in interviews also supported the Test Directorate finding. The overall integrated conclusion fully sustains the finding of the Test Directorate.

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(4) Leadership and Management.

"The performance of women possibly more than men was affected by leadership and management policies. Leadership and management problems were widespread among the units observed and appear to be the underlying causes of most problems involving women in the Army....Unit policies were often differential or preferential with respect to women.... Recommendations: Department of Army provide detailed policy guidance to the field on the employment of women in tactical and field environments." The questionnaires administered after the field exercise showed that 47% of nonsupervisory EM and 43% of the EW said male NCO's treated men and women differently. Of these, 51% of the EM and 16% of the EW said more privileges were provided to women, while 55% EM and 30% EW said easier jobs were given to women. Of the EW who thought NCO's treated EW and EM differently, 42% provided another explanation as to how they were treated differently. These write-in explanations usually indicated that EW were treated worse than EM. Male officers were thought by enlisted personnel as less inclined than male NCO's to differential treatment of EW and EM, but enlisted men who thought officers treated EM and EW differently more often indicated this difference as preferential for EW. Also, officer and NCO respondents who gave reasons for task failures resulting from "too many women in the unit," checked reasons that indicated poor leadership (such as: women not appropriately trained, supervisor didn't know how to supervise women, or men and women didn't work well together) as often as they checked inadequate strength of women. It is clear that questionnaire responses support the Test Directorate finding and recommendation.

(5) Bias.

"The REF WAC Directorate observed considerable and widespread bias in units towards women....The most significant bias found was among first line supervisors, who in many cases were highly vocal in their opposition to women. While these NCO's generally admitted female soldiers can perform well in their MOS tasks, most supervisors simply did not want women around. The reasons most frequently given were strength factors, risk of exposing women to combat, and added problems of hygiene, sanitation, and billeting....Recommendation: Develop and implement an Army-wide educational program to inform service members, particularly leaders, of the female role in the Army and of problems unique to women. Stress management and employment of women in a positive theme which underscores the value and importance of women in the Army." The discrepancy between questionnaire responses of NCO's where four to five times as many EW as EM were said to perform poorly or very poorly on "their jobs during REFORGER" and the daily performance ratings given to individual EW by their NCO supervisors indicated the occurrence of an interesting sociological phenomenon that often occurs with respect to targets of bias. That is, the individuals of a minority or other target group are accorded their observed value whereas the unobserved members of the target group are presumed inferior. Thus the evidence that women as a group were rated poorly on the questionnaire, although rated as highly as their male counterparts when rated individually, indicated a class bias against women. Also, the large number of EM (almost half) who said NCO's treated EW differently than EM, with only 28% of the EM responding that no difference in treatment existed, provided evidence that NCO's were either providing unequal treatment or had a credibility problem. A sizeable percentage of the EW believed that the discrimination was in the reverse direction of that perceived by the EM who believed treatment was unequal and in favor of women. Possibly both EM and EW were correct in that EW were discriminated against by not being permitted many career and ego-enhancing tasks because NCO's considered the tasks inappropriate for women and in that EM were discriminated against by being required to perform more night duty and physically demanding tasks. However, it appears that the enlisted men and women did not readily accept preferential treatment on one dimension as adequate compensation for discrimination on another dimension. One could argue, though, that differential assignment by NCO's was an attempt to capitalize on the special skills of men and women and thus the NCO's were more even-handed than they were perceived by their subordinates. However, any interpretation of these results leads to the conclusion that training on the special requirements of supervising mixed gender groups is needed. The Test Directorate finding is supported by questionnaire data.

RECOMMENDED MALE/FEMALE MIXES BY MOS AND UNITS

a. MOS Considered Too Physically Demanding for EW.

An empirical determination of which MOS are in fact too demanding for EW would require ratings of no less than 30 different individuals and occurrences of individual events for each of an adequate set of individual event rating modules. This set of modules would have to contain all of the more difficult and critical tasks required for successful performance of the MOS if it is to represent the MOS adequately. Such an approach is obviously impossible to accomplish under noninterference conditions, and it is not economically practical even if made possible through the imposition of a carefully controlled scenario. The more practical alternatives of measuring performance in laboratory conditions, rather than in a field situation, may be used eventually to validate physical standards for MOS. However, an evaluation of each unit duty position regarding strength requirements using job analysis techniques would be much more practical to apply as an operational procedure and would provide a more accurate appraisal than the opinion data available from REF WAC. Unfortunately, an Army-wide survey of this type might require up to two years to accomplish. Meanwhile, the Army must rely on more subjective estimates of the physical difficulty of MOS duties. These estimates can be found in the responses to the REF WAC supplemental questionnaire filled out by unit officers and NCO supervisors and in the ratings of Test Directorate personnel. These estimates by unit and Test Directorate personnel as to the physical difficulty of MOS tasks have added credibility, however, due to having been collected soon after the respondents had observed soldiers in a field exercise.

The data from the supplemental questionnaire relate to how many of the respondents believed each MOS in the MTOE of a specific company to be too physically demanding for the average female soldier. Since respondents were not asked how strenuous they believed each job to be, an average difficulty level for each MOS could not be computed from these data. The questionnaire results could be compared to the Test Directorate rating of each MOS as 1, 2, or 3 with a "1" assigned to those MOS for which the Test Directorate believed all tasks could be performed by women in the field and a "2" assigned to those MOS in which most tasks could be performed by women in the field. Only one MOS (telephone installer/lineman, 36C) was assigned a "3," indicating Test Directorate belief that this MOS had "few (critical) tasks within the physical capability of women."

The questionnaire MOS were divided into categories that reflected percentages of unit personnel saying that the MOS were too physically difficult for women. These categories divided the MOS into those said to be too difficult by 33% or fewer, 34% to 66%, and 67% or more of the respondents. Membership in these categories was then compared with whether a "1" or a "2" was assigned by the Test Directorate. Test Directorate personnel and questionnaire respondents generally agreed in judgments of physical difficulty for women of the various MOS. Those believed to be too difficult for women by one-third or fewer of the questionnaire respondents were placed largely by the Test Directorate in category "1," and those MOS believed to be too difficult for women by two-thirds or more of the respondents were placed largely in category "2." Unit officers and NCO's agreed even more closely with each other than they did with Test Directorate recommendations. There were some differences between the opinions of unit personnel and the Test Directorate. Several MOS assigned "2's" by the Test Directorate were designated by only a small percentage of questionnaire respondents as "too difficult" for EW. These MOS occur in signal companies and frequently have female incumbents. Test Directorate personnel possibly placed more emphasis on tasks that occur only at set-up and take-down times, whereas questionnaire respondents were placing emphasis on tasks which occur after set-up. Both unit respondents and Test Directorate personnel nominated some MOS as having tasks that are too difficult for women, even though EW performed well in these positions during REFORGER 77 according to both EW self-assessment and evaluations by their supervisors. The assessment of difficulty may be due to the fact that only a small percentage of respondents had knowledge of the quality of EW performance on a given job.

The REF WAC data on MOS in combination with human factor-oriented findings of the Human Engineering Laboratory and the survey and other data collected by ADMINCEN provide an excellent starting point for a more detailed analysis of MOS duties to identify the critical tasks that are too difficult for most female soldiers. The REF WAC questionnaire results indicated that there is considerable concern, at the troop level, as to the capability of female soldiers to perform many of the critical duties of their MOS in support units.

b. Distribution of EM and EW in Unit MTOE as Recommended by Unit Officers and NCO Supervisors.

The unit's officers and NCO supervisors were asked to show where on their unit's organizational table (MTOE) they would assign specified numbers of EW and EM. These hypothetical numbers of EM and EW were provided as separate tasks for the respondents for numbers making up 10%, 35%, and 50% of the total MTOE strength for EW, and 10% and 35% for EM. Those MOS considered too physically difficult for EW by a large number of respondents and those so considered by only a small number of respondents were separated into two sets and identified as most demanding ("hard") and least demanding ("easy") MOS, respectively. Most officer and NCO respondents concentrated EW in the "easy" MOS and EM in the "hard" MOS, when either 10% EM or 10% EW were being assigned. The additional 25% EW (or EM) required to raise the number being placed on the MTOE to 35% were frequently spread out over more MOS; that is, the concentration in "hard" or "easy" MOS was less.

Results indicated that respondents were following three conflicting assignment policies: (1) place women in less physically demanding MOS and men in more physically demanding MOS (the concentration policy); (2) spread women out so they would not make too large a proportion of the incumbents of any MOS or section (the proportionality policy); and (3) reserve men for jobs that require working in the midst of combat brigades as in supply and transportation FAST teams and maintenance Contact (now called MST) teams (the suitability policy). For small numbers to be assigned, the first policy (concentration) appeared to take precedence, with the second policy (proportionality) becoming more evident as additional men or women were to be assigned. The third policy (suitability) appeared primarily in maintenance and supply and transportation units where the physical difficulty of MOS tasks was obviously relegated to a lower precedence as compared to whether an incumbent of an MOS was likely to be used on FAST or Contact teams. It should be noted once more that the questionnaire item that asked for an explanation of "mission failures due to too many women" received almost as many responses pointed to unsuitability for reasons other than strength as it did responses citing strength deficiency.

The results of the questionnaire supplement showed that unit personnel clearly followed proportionality and suitability objectives in the distribution of women over the MOS in a company. The concentration policy with respect to strength considerations appeared dominant when small numbers of women were to be distributed (or small numbers of men in an otherwise all-female unit), but became less dominant as the mix approached half and half. It was felt that these concerns of unit officers and NCO supervisors are legitimate and should be given further consideration. The question of male/female mix is an important and unresolved issue that requires a more complex solution than the designation of open and closed MOS.

5. RECOMMENDATIONS AND CONCLUSIONS OF THE ARI RESEARCH STAFF

a. Research Conclusions.

(1) A performance decrement did not occur over time during REFORGER 77 for either men or women. The combination of weather, terrain, time in the field, and work load was not sufficiently stressful and fatiguing to induce a decrement in performance over time. Instead, a counter phenomenon occurred in which female soldiers commenced the exercise with performance below that of male soldiers. However, the female soldiers, either recovering from an initial shock or quickly acquiring the needed training and/or field experience, increased their level of performance to equal that of men in the latter part of the exercise.

(2) Female soldiers can provide a creditable performance in the kind of field environment encountered by support units during REFORGER 77.

(3) The MAX WAC results, showing no impairment of unit performances, up to the levels of female content tested, were sustained, except that the number of women in each REF WAC unit was just under 10% as compared to a maximum level of 35% in MAX WAC. The duration of MAX WAC was, of course, 72 hours as compared with the several weeks away from the home installation, including the three weeks under field conditions, and the ten-day participation in the CARBON EDGE exercise experienced by the REF WAC participants. As was true of MAX WAC, this conclusion of no impairment of unit performance directly applies only to like units. Unlike the MAX WAC finding, which implied that 6,000 more EW could be utilized than would be true if TRADOC limits were applied, the effective use of larger numbers of EW than are now in support units such as those in REF WAC is not implied by REF WAC results.

(4) NCO's rated EW in the abstract lower than they rated specific individuals. This finding suggests that an interesting sociological phenomenon which often occurs with respect to minority group members also occurred in REFORGER. That is, the individual members of the minority are accorded their observed value but the unobserved members of the minority group are presumed inferior.

(5) With respect to how well enlisted women performed on REFORGER 77, EM were most critical, NCO's were next most critical, and officers were least critical except for EW who rated themselves as highly as EM rated themselves. The two following interpretations of this phenomenon are possible: (1) proximity and presumed opportunity to observe produces lower ratings (with the exception of ratings by women themselves which are higher); (2) the lower ratings reflect a bias engendered by the assignment of men to "extra" work because of the presence of women (the harder physical labor, more night duty by EM, and more administrative care by the NCO's).

(6) Three sometimes conflicting assignment policies were followed by unit personnel in accomplishing the experimental task of distributing women (or men) to MOS positions in a unit's organizational table (MTOE). The policies and how they were met are listed below:

(a) A comparatively small number of women were placed in the MOS believed to require the greatest strength and a comparatively large number were placed in the MOS believed to require the least strength. In contrast, men were placed in the "harder" MOS. This concentration of men and women according to the perceived physical difficulty of the MOS tasks was most evident when the hypothetical task was to place a small number of either men or women in a company which was predominantly of the other gender.

(b) When the hypothetical task was to place larger percentages of either men or women against the company MTOE, officers and NCO's revealed a second policy of spreading out women across more MOS. Men were similarly spread out, probably to assure some men in each group to do the more physically demanding tasks. This tendency to place women (or men) in numbers proportional to the MTOE strength of each MOS reduced the concentration of men or women that was based on physical demands of the job.

(c) In some supply and transportation and maintenance companies, the hypothetical assignment of 10% men (remainder of company being women) was apparently determined heavily by the frequency with which the MOS occurred in a supply and transportation FAST or maintenance Contact team. This emphasis resulted in a comparatively small number of men being available for placement in the more difficult physical tasks--a number which was actually less than the proportional male share of unit strength. It is not known whether this third policy, suitability, would have been as important if unit personnel had understood and accepted the then very new and as yet undisseminated DA policy permitting female soldiers to be assigned forward of the combat brigade rear boundaries as members of FAST and Contact teams. The importance of a number of factors, in addition to strength requirements, in shaping opinions of unit personnel as to where women are most appropriately utilized remains unclear.

(7) Of the 89 MOS considered (98 MOS were in the MTOE's of the participating units), 18 were designated by 50% or more of officers or NCO supervisors as being physically too demanding for women. Either these jobs are in fact unsuitable for women or training, indoctrination and leadership within these units had not adequately informed male supervisors of the capabilities and responsibilities of female soldiers.

(8) The percentage contribution of leadership, morale, personnel turbulence, training, and proportion of women "to the ability of a company to accomplish its combat mission" was asked of both unit officers and supervisory NCO's. The percentages assigned these factors by officers ranged from 40% for leadership to 5% for proportion of women in the unit. The rank order of these factors (from high to low percentages) by officers and NCO's was the same as that obtained from officers of the 40 units participating in MAX WAC. Thus, while unit officers and NCO supervisors expressed concern regarding the impact of women on unit performance in both interview and questionnaire responses, they placed much greater importance on other factors as having a comparatively greater impact on mission accomplishment.

b. Recommendations for Future REF WAC-Type Test.

There have been a number of lessons learned from the process of planning and implementing REF WAC. Many of the ARI recommendations for incorporation into any future REF WAC type research effort or force development test require more lead time than could be given to ARI for REF WAC 77. Some of the recommendations relating to lead time are as follows:

(1) Establish liaison activity with both CONUS-based and USAREUR-based units eight months in advance, or as soon as units are notified.

(2) Begin collection of nondeployability data six months before units are due to deploy on the exercise. Many of the personnel shifts that occur in that time frame are to accommodate the nondeployables or to avoid taking undesirables without spotlighting such decisions.

(3) Have all data collection instruments ready in time for preliminary tryouts on troops. These should be timed to make appropriate modifications to assure that all text is understood to mean what was intended.

(4) Bring Test Directorate officers on board in time to permit training in use of instruments.

(5) Select NCO data collectors by name after interviews of outstanding candidates.

More USAREUR support would improve the quality of the data collected. Considerable USAREUR support is required for even a minimal effort. Some of the improvements that would require more support than was available for REF WAC 77 follow:

(6) Provide each NCO data collector with a jeep when he/she is covering more than one company.

(7) Officer evaluators and NCO data collectors should live and stay in the units. However, pup tents are not adequate. The requirement for privacy to accomplish required paper work justifies at least a squad tent for evaluator use in each company.

Finally, the difficulty of collecting equivalent data on male and mixed groups under the noninterference condition of REF WAC 77 leads to the last three recommendations:

(8) A future test should include controlled fills of enlisted women in the participating companies. Also, a prescribed concentration of EW in the groups within the companies is required in order to provide an adequate number of all-male groups and comparable groups with a high density of EW.

(9) Have sub-scenarios, or scenario interdiction, to provide simulated work loads and tactical tasks for support units with a capability of doing more than is required in support of the combat brigades.

(10) In the event sub-scenarios or scenario interdiction is denied, rely entirely on supervisory ratings (collected by NCO data collectors) and collateral research questionnaires.

6. RECOMMENDATIONS FOR ADDITIONAL RESEARCH AND STUDIES: FINDING OUT ABOUT WHAT THE ARMY STILL DOESN'T KNOW

a. *Clearing the Air*.

Managers may very well perceive that the primary contribution of MAX WAC and REF WAC has been to clear the air with respect to the belief, erroneously held by many, that female soldiers could not or would not effectively perform their MOS skills in support companies under field exercise conditions, and/or could not maintain their physical and psychological health in the field, and/or would adversely affect the morale of male soldiers to the point that their performance would be impaired. It should now be possible to address, openly and directly, the passionately pleaded concerns of many field commanders that units with large numbers of women may have a reduced readiness for combat because:

(1) The average female soldier in a support unit *may* be less effective in unit defense than her male counterpart.

(2) The average female soldier in a support unit *may not* be as useful as a rifle bearing replacement for combat brigades, and *may not* be as effective as a member of reaction teams to accomplish various tactical contingency mission as compared to a male support company soldier.

(3) Public opinion *may* require the withdrawal of women from support units in time of emergency as it becomes apparent that they will be in close support of the battlefield, leaving the company with vacancies in key MOS that are heavily occupied by women.

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(4) Many combat veterans recall that men on the battlefield, who are about to kill and be killed, have comparatively primitive attitudes towards interpersonal relationships; the maintenance of discipline with respect to the behavior of male soldiers toward women in other units (or even in their own units) could break down, or maintenance of discipline might be at considerable cost to overall unit effectiveness.

Future research should focus on the resolution of these concerns. The first step in this direction should be the clarification of Army doctrine with respect to the expectation (and probability) that support unit soldiers will perform both technical and tactical roles on the battlefield of the future.

The ARI five year research plan for the "Role of Women in the Army" has provisions for research to be conducted on support company reaction teams with prescribed gender mixes performing carefully controlled and measured tactical contingency tasks. Current plans call for using the ARI-developed REALTRAIN "scopes" approach to the measurement of performance on contingency tasks such as reaction to ambushes, perimeter defense, removal of sniper nests, and the establishment and holding of road blocks.

Other research is planned for obtaining more objective performance data on teams and work groups with varying male/female mixes and on the willingness of female soldiers to volunteer for participation in contingency missions. The collection of comparable nondeployability data on male and female soldiers assigned to support units will continue.

A study addressing the utilization of support unit soldiers in technical vs tactical roles for a scenario involving a highly fluid European battlefield should be initiated. For example, the technical mission of a maintenance unit in such a scenario might cease with the actual start of hostilities due to the high state of mobility required of the unit, the poor physical contacts between the unit and the combat brigade being supported, the presence of hostile forces well back of the forward edge of the battle area (FEBA), and the need of the combat brigades for replacements. Existing war games do not reflect player decisions to cannibalize support units or use support units for tactical contingency missions, although historical studies show such decisions on the part of the defenders to be not uncommon. Modifications to permit [illegible] decisions relating to the use of support company personnel as an additional player option would be required before existing war games will provide input to the resolution of this issue.

b. Required Information for Policy Makers.

Major decisions affecting how future wars will be waged are always based on partial information or guesses that are hopefully educated ones. Decisions as to the gender mix of Army units are among those that definitely will affect the resources available to a field commander. Such decisions must be made with only partial information on the nature of future wars, how well soldiers in different mental categories will perform, and the availability of men and women in various mental categories for enlistment into the Army. No existing research results have shed any light on the following questions:

(1) Will women continue to enlist at present rates as higher percentages of female recruits are required to serve in support units and continually demonstrate their deployability and willingness to serve on the battlefield in time of war?

(2) Can changed training and indoctrination procedures induce officers to eliminate preferential treatment of soldiers that is due to gender, and can they convince the troops that preferential treatment has stopped?

(3) Can support unit soldiers of both sexes quickly convert to effective fighters on their own defensive perimeters, as members of unit reaction teams, as combat unit replacements and in ad hoc combat teams assigned to special combat missions? Are there differences in this respect between male and female soldiers?

(4) Can female officers and NCO's effectively lead otherwise all-male or mixed gender reaction teams (or other ad hoc combat teams) in accomplishing tactical missions on a battlefield?

Research-based answers to all the above questions will have to wait until adequate numbers of female soldiers have entered the Army and have received on-the-job training and experience in support units. No amount of research emphasis backed with unlimited resources could have provided answers to these questions by 1978.

c. Planned Additional Analyses on MAX WAC and REF WAC Data.

The prescribed submission date of this report did not permit a number of in-depth analyses of the data. Cross-variable relationships within the REF WAC questionnaire data have not been explored, and several hypotheses relating to the company by company linkage of performance measures and questionnaire responses have not been investigated. Also, while a preliminary analysis showed a relationship between the number of soldiers in a group and group event ratings, this relationship differed for all-male and mixed groups. Although this finding could explain important performance group event rating variance, there was not sufficient time to make the additional statistical checks to verify nonchance relationships. These analyses, and others, will be reported in follow-on technical reports. As in REF WAC, the inter-relationship among questionnaire variables could not be provided in time for the MAX WAC management report, and a follow-on technical report was promised. The analyses required for the MAX WAC follow-on technical report were moved back in priority to permit an early REF WAC reporting date. The MAX WAC collateral research questionnaires included sets of variables relating to differential assignment of male and female soldiers, peer confidence in male and female soldiers under tactical conditions, and attitudes relating to non-traditional roles for women. Technical reports on these topics will be initiated this year.

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Senator Kennedy. The purpose of the research was to assess the impact of female soldiers on the capability of a unit to perform its mission under extended field conditions. The findings are as follows: "The presence of female soldiers on Reforger 1977 did not impair the performance of combat support, combat service support units observed when the unit mission was defined in terms of the Reforger 1977 scenario."

I am just wondering whether you are familiar with that particular study, and whether you find that these arguments that are made about the bonding of male relationships in the combat arms is of such importance and significance that they cannot be violated, given the findings of this kind of study.

Ms. Chayes. I think the study is remarkable in that it varied the percentage of women in the units and found that the strength of the units did not appreciably vary. I think that is a very important finding. It was a very realistic exercise.

I am really mystified by male bonding. I think it is bad sociology. I think it is pop sociology. I think there are other studies that really demonstrate otherwise when one begins to look at what combat cohesiveness is all about. Berryman's studies done recently, and studies of Vietnam show that what promote cohesion is survival; that laggard performance or macho performance tend to detract from unit cohesion, because it threatens survival.

I think one can make a romantic case, as has been made by Tiger and others that Eliot Cohen cites, but I find this is pop. It really has very little meaning and it is a fig leaf for discrimination. [Laughter.]

Senator Kennedy. Mr. Cohen, I think you deserve under the fairness doctrine an opportunity to respond on that.

Mr. Cohen. Let me just give you a little bit of background on those so-called pop sociologists I was referring to. The first one, Brig. Gen. S.L.A. Marshall, was the foremost combat historian of the American Army during World War II. His book, "The Armed Forces Officer," is distributed to every officer in the Armed Forces. He is responsible for many of the policies that we have today, down to such matters as the size and organization of squads. He was by no means a pop sociologist.

The other two sociologists whom I do quote are Prof. Edward Shils and Prof. Morris Janowitz. Prof. Edward Shils has been widely known as perhaps the most prominent sociologist in the United States, influential in a number of fields, not just military sociology. Prof. Morris Janowitz is certainly the most prominent military sociologist that this country has. His book, "The Professional Soldier," is and always has been a classic.

If I might also comment on the Reforger exercises, there are a number of points here. One, any peacetime——

Senator Kennedy. Well, those sociologists, what do they exactly say? You say they all support your thesis that the military organizations make conscious use of masculinity, make appeals to it——

Mr. Cohen. Absolutely.

Senator Kennedy [continuing]. Indeed, exaggerations of it that occasionally strikes us as tasteless or vulgar but it performs invaluable service of welding groups of young men into units of proud, aggressive, and competent soldiers.

Mr. COHEN. Yes; I refer you to the Shils and Janowitz article, "Cohesion and Disintegration in the Wehrmacht," which was published in 1948 in Public Opinion Quarterly. It explicitly talks about the role of masculinity and also the impact on morale of the sense of concern about families at home.

I would be glad to send you a copy of the article. It is widely regarded by military sociologists as a landmark piece of research as, indeed, it is. The purpose of the article was to discover why the Wehrmacht held out as long as it did under extraordinary conditions, outnumbered, completely inferior in the air, in equipment. What they found was that this ability resulted from the cohesiveness of small groups, centering on what they termed a "hard core" of what Ms. Chayes might consider excessively macho men. In this context, I find such pejorative terms ridiculous.

If I might comment on the Reforger exercises——

Senator KENNEDY. Just before we go to that, your sense is that we are going to be fighting the wars of the future the way we fought them in the past.

Mr. COHEN. I think World War II and the 1973 war in the Middle East are very good predictors. One thing that is interesting is the Israelis did take some female casualties at the very beginning of the 1973 war in the air raids on Sinai bases. Women were not at the front lines. They were at the rear bases.

Men reacted in an extraordinary fashion to the site of decapitated female bodies. No Reforger exercise, no peacetime exercise does that—and thank goodness. The reaction was such that the men were unable to participate in combat. This was a point that Gen. William Westmoreland made in some of his testimony several years ago on the impact of women in the military.

Senator HATCH. Your time is up, Senator.

Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman. I have a chairmen's meeting I am going to have to go to. I would like to take this opportunity to thank you for coming here, both of you, for your presence and for the testimony you have given in this hearing. I am sure it will be very helpful to the committee.

I have some questions I will have the staff give to each of you. If you would kindly respond to those, I would appreciate it.

Senator HATCH. Thank you, Senator.

Ms. Chayes, under the ERA could there be any military positions closed or restricted to women as a class?

Ms. CHAYES. No; the tests will have to be tests of capability. Tests that are strictly gender based would not be permissible.

Senator HATCH. Do you agree with that, Mr. Cohen?

Mr. COHEN. Yes.

Senator HATCH. In 1975, in *Schlesinger* v. *Ballard*, the Supreme Court upheld a Navy policy under which male Navy officers were allowed a shorter period of time than female officers in which to receive a promotion or face discharge.

Would military policies of this sort be allowed to continue under the equal rights amendment?

Ms. CHAYES. I think where you are dealing with affirmative action issues, where the policies are designed to correct inequities of the past, just as in race cases, they will be very carefully scrutinized by the courts, if, indeed, they ever get to the courts.

But that beyond that, there will not be an absolute prohibition. I mean there is a lot of language in that case that I would not like to see repeated in another case, but I think the principle is correct. Affirmative action, again, where it is carefully crafted and carefully designed to correct past inequities should be allowed as it has been in race cases under the 14th amendment.

Senator HATCH. Would it be fair to say, then, that according to your interpretation the ERA requires equality unless women have the advantage?

Ms. CHAYES. No.

Senator HATCH. It would not be fair to say that?

Ms. CHAYES. No, it would not be fair to say that. In my view, the correction of past inequalities, a transitional period may be needed to bring the class that has faced systematic discrimination to equality.

Senator HATCH. I see. Mr. Cohen.

Mr. COHEN. I think that would just exacerbate the problems that I have outlined.

Senator HATCH. What does that mean?

Mr. COHEN. That if you had an affirmative action policy such as Ms. Chayes has outlined, you would have even further difficulties, I think, particularly resulting from the disparate impact problem. We would see further reduction of physical standards, further introduction of women than one would have if there was simply a gender-neutral standard which is the ultimate objective. Under ERA, I think we will fudge a so-called gender-neutral standard even more than we might otherwise.

Senator HATCH. The Commission on Civil Rights, in another analysis of the equal rights amendment, concluded that following passage of the ERA there will be a particularly strong need for affirmative action programs in the uniformed services.

Would affirmative action programs which are designed to provide preferences to members of one sex or another be consistent with the explicit direction of the equal rights amendment?

Ms. CHAYES. I think you really have to look at specific facts. What is interesting about *Schlesinger* v. *Ballard* is that the reason for longer promotion time for women was the broad exclusions, those designated as combat positions. Therefore, as I had said before, this affected women's careers adversely.

So where we are dealing with prior discrimination and exclusions, affirmative action may be required. Where the situation has not involved discrimination, preferences will not be allowed. Such preferences would not pass any constitutional test that I can conceive.

I do not see any problem with affirmative action. We have dealt, I think, very nicely with these problems in the title VII experience, and also under the equal protection clause. It does takes a long time and it is very much case by case.

Senator HATCH. Mr. Cohen?

Mr. COHEN. Let me explain one of the kinds of problems that I think we could find ourselves in. If we use the physical strength standards we have now, it is quite clear, as Senator Packwood, in his testimony pointed out, that we would probably have very few women going into, say, the infantry in the U.S. Army. Maybe the infantry would be as low as 5 or 10 percent female.

Well, that is all very well. The problem is that promotion in the military, particularly at the higher ranks of general and so on, is strongly determined by one's previous branch and the combat branches, infantry, armor, artillery—the areas from which women on the basis of neutral tests would probably be largely excluded—are the branches that get the greatest number of promotions.

How is one going to deal with that? It seems to me we would be likely to have affirmative action programs which would try to compensate for that, and thereby completely disrupt the ethos of the Armed Forces with regard to promotion.

Senator HATCH. Ms. Chayes?

Ms. CHAYES. I think, in a way, we are blessed by the fact that we are in a high technology military at this point, that, in fact, the requirements are changing and the kinds of skills that are required are not just those of brute strength, but intelligence, capability, technical background, all of those things are going to count for a great deal. So therefore, I do not see a major problem of inequality once the artificial combat restrictions are removed. Now, I think one always has to be alert to the fact that affirmative action not become a quota system. I think that is always a problem. I see nothing in the ERA and nothing in the interpretation that we have suggested that you have heard before you previously that would lead to that kind of result such as Eliot Cohen describes.

Senator HATCH. I do not want to belabor the point, but let me read a quote from the California Commission on the equal rights amendment: "For purposes of this commentary, it has been assumed that neither benign nor compensatory aid will be allowable under the absolute interpretation of the ERA since such programs discriminate against men solely on the basis of their sex." Do you disagree with that statement of the California Commission?

Ms. CHAYES. It is out of context. I do not understand it.

Senator HATCH. They are saying that preferential treatment such as affirmative action will not be allowed under the equal rights amendment since such programs discriminate against men solely on the basis of their sex.

Ms. CHAYES. That is a very confusing statement as you have read it. If you are talking about straight preferential treatment by sex, that is correct. If you are talking about the kind of treatment that compensates for past discrimination and that can be very clearly shown to be that and has to be subject to very careful scrutiny, I think that is allowable.

Senator HATCH. Let me ask you this. Prof. Paul Freund, who, of course, is one of the great modern scholars of constitutional law, stated that, under the equal rights amendment, "Women must be admitted to West Point", and presumably the other military academies, "on a parity with men."

Do you agree with this observation? Will the admissions policies at the military academies be affected by the equal rights amendment?

Ms. **Chayes**. Of course, that issue became moot in that the military academies, in fact, admitted women without the passage of the ERA.

Senator **Hatch**. Nobody objects to that, but that is not my point.

Ms. **Chayes**. Well, if he meant by parity that it would have to be 50-50, the answer is clearly no. But if he meant by parity that people, men and women, would have to be looked at with regard to their qualifications and that there would be no bias in the admissions based upon the realistic qualifications for officers in each of the three services, that kind of parity, I think, already exists.

Senator **Hatch**. Professor Cohen?

Mr. **Cohen**. I disagree for the reasons that I have discussed before. I think there will be inevitably political pressure to drive admissions ratios closer to parity. Again, I would point out that West Point provides a disproportionate number of combat arms officers, which makes this a particularly sensitive point.

Senator **Hatch**. Senator Kennedy?

Senator **Kennedy**. Ms. Chayes, I welcome your responses on a number of these issues, especially on the question of the affirmative action, because that issue has been made a red herring, and I think your responses have been very helpful.

Let me ask you this question. Do you find that just as a general matter those that are opposed to establishing an objective criteria of qualification for the various military entities sort of rely on old stereotypes with regard to women in the Armed Forces?

I do not want to be unfair to the professor, but it seems to me that the kinds of comments that you hear as reflecting upon women and their performance in the military seem to me to have a ring to them as to being the kind of reasons that women would be kept out of the board rooms of major corporations or kept out of the universities.

Do you find it may be that the military may be one of the last vestiges of this kind of stereotype or not, as someone who has followed this issue for a number of years?

Ms. **Chayes**. Absolutely. What is so curious is that when there have been certain requirements in the military or in other professions, firefighting and the police, for example, on the civilian side, and when those qualifications have been challenged and subjected to rigorous tests by the Court, they have often disappeared or been altered. That is cited as evidence that the standards are being lowered. In fact, that is not the case. With the police, with firefighters, the standards are being made really specific to the job. In those professions, for example, it was found that incoming recruits could meet the standards but the people performing the jobs very often could not, yet they were performing the job. So the standards must not have been job related.

Now, I am not for lowering standards. I am strongly for establishing standards that are needed for the job. Where the job needs strength; if it really requires lifting 100 pounds, nobody who cannot lift 100 pounds should be admitted to that specialty. But let us validate those requirements.

Mr. **Cohen**. Senator, if I may have the opportunity, I did not in any way suggest that women cannot perform well in other kinds of organizations. In fact, in my testimony, I believe three times I explicitly say that women perform perfectly well in the board rooms, in educational institutions, and governmental bureaucracies.

My argument is on the basis of uniqueness of military institutions. I know as a constituent of yours how strong a supporter you are of the State of Israel which, after all, has had a female Prime Minister, unlike this country which has not yet had a female President.

And yet surely I would doubt that you would think that the Israeli combat exclusion policy is simply based on old male stereotypes. It is a country which is on the very margin of survival, as you have so eloquently pointed out a number of times, and yet they refrain from these kinds of policies.

Senator KENNEDY. Well, I dare say I think religion has got something to do with it, Professor, do you not?

Mr. COHEN. Not really because the——

Senator KENNEDY. You do not?

Mr. COHEN. No. The initial decision to pull women out of combat units was made by Prime Minister Ben-Gurion, who was not personally a religious man. The way that religious factors have operated is through loosening of what is, in effect, a conscientious-objection clause, but that has nothing to do with the bulk of the military.

As I am sure you know, the dominant ideology of the State of Israel particularly at the very beginning but now as well, has quite different roots from those of religion. In fact, it has roots in late 19th-century socialism.

The religious factor plays no role whatsoever. Jewish law does not prohibit the use of women in combat. I have had the privilege of speaking to a number of Israeli generals and officers and soldiers, many of whom are quite secular, many of whom, in fact, are antireligious, and without exception, they have been extremely critical of American military policies involving use of women.

Senator KENNEDY. Well, rather than debating that particular issue, my understanding, and I have talked to some generals as well and have had the opportunity to visit Israel a number of times, my information is contrary to yours, but rather than getting into that, and I do believe having followed that issue for some time that the basis for it has strong religious implications, but I will go to Ms. Chayes if she wants to add anything to that particular question.

Ms. CHAYES. Only that the treatment of women in the military and the attitudes toward them is not based on performance. I agree with you, Senator Kennedy. The underlying reason is religious attitudes, and that has become stronger with the more recent immigration since 1948.

Senator KENNEDY. That is my understanding.

Ms. Chayes, as someone who has followed this issue over a period of years, do you, in your own reading, remember arguments that were made about this bonding concept when there were segregated military forces. Weren't there those that argued that we would not be able to have the kind of esprit de corps if we had integrated units?

It seems to me that argument was made during that period of time and certainly is without support, given the performance of various integrated combat troops in battles in Korea, Vietnam, or in other parts of the world. I am just wondering whether there is anything you want to say about that.

Ms. **Chayes**. Well, the arguments were made very strongly with respect to blacks to the point where we went all the way through World War II with segregated Armed Forces. As you recall, on integration, it was not until after the war that the full integration took place, and thereafter the issue vanished.

I want to go back to my statement on pop sociology, because, although Eliot Cohen can quote "Shils," that study really is quite a different purpose. That study did not deal with the issue of women, and I think there the use of the word "masculinity" is probably a surrogate for a lot of other characteristics. The study did not juxtapose masculinity and femininity. I think findings couched in terms of "keeping the home fires burning" can be analyzed and correctly interpreted to mean that the soldier is fighting to preserve the safety of immediate family members—parents, and wives, and children. In fact, those tugs often have both a positive and a negative effect on fighting ability. It is a very subtle kind of issue.

I think that to cite those studies that talk about the endurance of the Wehrmacht as an argument to exclude women is really a distortion of their findings. The only kind of studies that really zero in on women "ruining" the foxhole—like the male locker room—those studies are, in fact, pop sociology.

Senator **Kennedy**. Do you think that women are as well if not more motivated in terms of protection of home or family or are they less desirous of holding or cherishing those values?

Ms. **Chayes**. I would not want to meet up with a female grizzly bear with the young around. [Laughter.]

Mr. **Cohen**. I am in favor of drafting grizzly bears, Senator.

Senator **Hatch**. You had a comment you wanted to make.

Mr. **Cohen**. Yes, there are a number of points. One, I think Ms. Chayes has changed her ground from saying that somebody was pop sociologist to saying that their arguments do not meet her standards of evidence in this case.

If you do read the article—I do not know whether Ms. Chayes has or not, but if you do read the article carefully, and as I said, I would be glad to supply you with copies of it, it does refer to specifically masculine characteristics. In fact, there is even a discussion of homoeroticism.

There is a similar discussion in Glenn Gray's book "The Warriors," which is also a very fine piece of sociological analysis.

If I might also comment on the issue of integration. During World War II, black men served in combat in segregated units, but the two issues are quite different. It was not a question of segregation on the basis of who would go into combat, who would not. And, in fact, integrated units turned out to perform better than segregated units.

In addition, we have had a history of integrated units in the American military. As you know, most segration dates back to the late 19th century not before. This is quite different from the experience with women in the military. We have a much longer history which goes basically to support my point.

Senator HATCH. Ms. Chayes, Professor Emerson of the Yale Law School has said that following ratification of the equal rights amendment, "distinctions between single and married women in the military who become pregnant will be permissible only if the same distinction is drawn between single and married men who father children". Do you agree with that observation?

Ms. CHAYES. That is not a statement as such that I would support.

Senator HATCH. OK. Mr. Cohen——

Ms. CHAYES. If I may elaborate on it, I think if we start from the premise of gender neutrality, the problems are ones of physical disability that would affect performance, just the same as we are talking about capabilities that affect performance.

Any pregnancy may affect performance in certain areas during certain periods of the pregnancy and not in others. Therefore, I think pregnancy will be looked at as it substantially is now looked at, as a disability. It will be essentially related to the requirements of the job, whether in wartime or peacetime.

I think that it is rather a bold statement the way Professor Emerson has made it, and I would not do it that way.

Senator HATCH. But you say you would not do it that way.

Ms. CHAYES. No.

Senator HATCH. You could not support that statement, but what would be likely to happen if the equal rights amendment is ratified?

The issue is not pregnancy in this case. The issue is the distinctions between people who are pregnant and married and pregnant people who are single.

Ms. CHAYES. But these are really different issues. The issue of pregnancy before birth is an issue of physical capability. The issue of child care, as I tried to describe before, is an issue of hardship. Obviously men do not get pregnant. They do not have that problem, but they have other problems of incapacity, and you deal with those across the board. With respect to the issue of child care, the military service must deal with a parent responsible for the child, without regard for gender or marital status and let the chips fall where they may.

Senator HATCH. Mr. Cohen, you had a comment?

Mr. COHEN. I know you do not want to discuss the pregnancy issue too much, but if I can make this point. In the study which, Ms. Chayes quotes, Col. Frank Partlow's study of women in the military, he makes a very interesting point which is that pregnancy should probably be treated by the military as a self-inflicted disability, like such matters as sunburn. A soldier who lets himself get sunburned to such an extent that he is not available for duty is liable to disciplinary action.

That suggests to me that pregnancy will not or could not be viewed as simply a status like parenthood. It is something that comes about as a result of some sort of conscious decision and would, if ERA were passed, be treated as a self-inflicted disability.

Senator HATCH. Professor Cohen, how do you reconcile the following facts. Public opinion polls demonstrate consistently that the vast majority of the American people do not want to see women eligible for combat.

Yet public opinion polls also suggest that a majority of the American people want to see the ERA approved. Now, is it fair to conclude that most of the supporters of the ERA do not expect or anticipate that it will lead to women in combat roles?

Mr. COHEN. I think that is true. I think one of the things that makes these hearings so valuable is that you are attempting to establish what precisely the equal rights amendment means.

I think people, if they favor it, favor it as a symbolic gesture rather than understanding of what practical consequences it would have.

Senator HATCH. Go ahead, Ms. Chayes.

Ms. CHAYES. I would like to respond to that, because I think the most recent polls about combat roles for women are very interesting in that regard and do not support some of the earlier polls. That does not mean there has been a major shift in opinion necessarily but that there is some confusion as to what the meaning of this all is.

In 1982, the National Opinion Research Center had a poll and there they were asked a number of questions. People were asked a number of questions about particular specialties. There was virtually unanimous support for some military specialties I would say, more or less stereotypical kinds of positions but, also support for a wide range of nontraditional positions.

Nurses in combat got 93.5 percent support, and national service for women did also. A greater proportion of the Armed Forces got 91 percent support, and military truck mechanics, as it was put, got 83 percent support. So you were moving to nontraditional. When you got to real combat roles, there seemed to be a majority support, though it was slimmer than the overwhelming majority that I described.

Jet transport pilots, jet fighter pilots, what was described as missile gunners in the United States which I take it to mean the ICBM force——

Senator HATCH. Who did this particular poll?

Ms. CHAYES. This is a National Opinion Research Center, and that is the University of Chicago, and that is done in 1982, which is as recent a one as I have been able to find.

Senator HATCH. I have one here, the NBC/Associated Press poll of July 1983. It asks: "Should women be allowed to hold combat jobs in the military?" Should, 36 percent; should not, 57 percent; not sure, 5 percent.

Ms. CHAYES. I think when you have that grossly stated in terms of combat or noncombat, you are going to get that kind of a response. When you begin to break it down to specific jobs, I think you find a lot more precise thinking about it even among the public. It is very interesting to me that nobody is worried about nurses in combat. Nobody is worried that these are primarily women exposed to hostile fire and they die, or they become POW's. That has happened by the hundreds in World War II.

When you get to less stereotypical jobs, there is some concern but still majority support. I mean, jet pilots, for example. There is nothing more stereotypically male that you could think of. However, the majority support for women in combat seems to erode if there is only a gross statement.

My own view is that people, when they are really pushed, will recognize that everybody is going to be in combat in the sense of being exposed to fire. Stereotypes will break down as the understanding of what is involved is increased.

Senator **HATCH**. Let me ask you two for a favor. I have a number of questions that I think are crucial, but I am supposed to be at a chairman's meeting, and Senator Baker has just asked me to come to his office. It is 12:15 and I am sure you would like to have lunch. Is it convenient for you to return here at 2? I would like to just finish this up. I think this is a very important hearing, and both of you have helped us to better understand this issue.

Let us recess until 2. We will meet again in this room. I apologize I could not finish right now but it is important that I get to the chairman's meeting. Thank you for accommodating me. I appreciate it.

We will recess until 2.

[Whereupon a luncheon recess was taken.]

Senator **HATCH**. I want to thank both of you for being willing to come back this afternoon. It has really helped me out. I know, Ms. Chayes, you have to leave about 3:30.

Ms. **CHAYES**. I have to leave about 2:45 to make a 3:30 plane. Anyway, you are all alone. You have at us with no constraints, no supporters of ERA. So I am all yours until I must leave.

Senator **HATCH**. Well, that is a unique position to be in. [Laughter.]

Ms. Chayes, under the ERA, could there be any distinctions whatsoever between men and women in the enlistment policies of the military in such areas as minimum age?

Ms. **CHAYES**. Would there be any difference in minimum age?

Senator **HATCH**. Could there be under the ERA?

Ms. **CHAYES**. No.

Senator **HATCH**. Could there be any differences relating to such matters as in parental consent or educational credentials?

Ms. **CHAYES**. I would think not, no gender-based differences.

Senator **HATCH**. Could there be any distinctions whatsoever between men and women in mental or physical aptitude scores?

Ms. **CHAYES**. No. Aptitude scores and mental ability are screens for performance and not for sex quotas. Cutoff screens will have to be justified if they had a discriminatory impact.

Senator **HATCH**. So both men and women have to meet those cutoff screens?

Ms. **CHAYES**. They both will have to meet the cutoffs.

Senator **HATCH**. Would physical standards have to be identical for men and women under the ERA?

Ms. **CHAYES**. I think you probably have screening physical standards that everybody will have to pass, and then you will have specialty standards that will be higher for certain specialties. So my guess is, you know, there are different ways to do this.

Senator **HATCH**. Would these specialty standards be identical for men and women?

Ms. **CHAYES**. Specialty standards would be standards that bar people, and therefore, men and women might enter at a different rate, but the standards would not be based on gender. For example, if the job requires being able to lug something 300 pounds, anybody who can do that gets into the specialty. Anybody who cannot does not. If it has a disparate impact, the chips will fall where they may if it is really a justified standard.

Senator HATCH. Do you agree with that?

Mr. COHEN. I agree with that. I would like to emphasize again the enormous difference in this as in so many other respects that the equal rights amendment would make. For example, the military until now has been able to take only women who are high school graduates. They had a lower educational standard for men. That policy would have to go by the board.

Now, remember that a lot of the figures that have been quoted to you have been on the performance of women in the All-Volunteer Force, which are unrepresentative because the military has been able to apply different standards for selection of women than men.

In addition, this would involve getting rid of different standards in such things as the physical readiness test. For instance, the minimum number of pushups that a man has to be able to do is 40. The minimum number of pushups that a woman has to do is something on the order of 18 or so. This would have to be changed. These would have to be uniform standards all the way across the board.

It is quite conceivable to me that if we maintain the current standards you might actually have, in some cases, fewer women in the military.

Senator HATCH. Do you agree with that, Ms. Chayes?

Ms. CHAYES. Interestingly, I would ask whether 40 pushups or 60 pushups are required to do most of the jobs.

Senator HATCH. Assuming they are.

Ms. CHAYES. Assuming they are, let the chips fall where they may.

Senator HATCH. Would the policies and principles of such legislation as title VII or the Equal Pay Act be applicable in their entirety to employment by women in the military?

Ms. CHAYES. Which are you talking about? I mean, there are statutory provisions——

Senator HATCH. Well, would there be bona fide occupational qualification exceptions applicable to employment by women in the military as in title VII?

Ms. CHAYES. I do not see any constitutional basis for a BFOQ. I do think, however, that there are physical characteristics of women that might come fairly close to that concept and where you are dealing with physical characteristics which might affect privacy issues, for example, I can see that a compelling State interest standard might be applied. But I do not see that you import into the ERA all of the judicial gloss on title VII of the Equal Pay Act any more than you have imported that into the 14th amendment.

I mean, there is a certain judicial reciprocation as these doctrines develop, but I do not see that operating as a constitutional matter.

Senator HATCH. Do you agree?

Mr. COHEN. I think ERA means what it says. There can be no distinctions based on gender, period.

Senator HATCH. Would military recruitment policies such as the ROTC process be required to adopt similar policies for both men and women?

Ms. CHAYES. I think the ROTC is a form of screening just as enlistment and the aptitude and capability testing is just at a more sophisticated and intense level because you are dealing with officer candidates. But, the same principles would apply to ROTC as to enlistment in the service.

Senator HATCH. So they should apply identical policies to men and women?

Ms. CHAYES. Again, I think the position I am trying to make, Senator, is that standards are adopted that are relevant to the job assignment and the job level, and that both men and women have to meet those standards. The standards are not going to be loweredfor women, and they are not going to be permitted to be artificial to exclude women.

Senator HATCH. The only question I am asking is, will the standards be identical?

Ms. CHAYES. There is only one standard is what I am saying. There is a standard that is job related. There are not standards.

Senator HATCH. So it would be equally applicable to men and women. That is all I am asking.

Ms. CHAYES. Absolutely.

Mr. COHEN. Senator, if I may just add, standards would be identical, but given some of the prior testimony, I think it is important to point out that given that a number of the supporters of the ERA have endorsed affirmative action in the military, it is conceivable that those rules might again be fiddled with in the interest of affirmative action.

Senator HATCH. Would you expect the military academies to be under the same obligation to follow affirmative action principles?

Mr. COHEN. I would think so.

Ms. CHAYES. I think that really represents a misunderstanding of what affirmative action is. I think that we have seen enough in the case law that quotas are themselves very suspect. Where you are dealing with compensatory measures, I think affirmative action comes into play.

In my view, I think this is something that would need authoritative disposition. I do not see compensatory admissions as a way of compensating for low numbers of military women in the past.

So that you say: "Well, now you are going to have 75 percent women in the service academies because we kept the number so low." I think nobody is proposing that. That is a ridiculous reading of ERA.

Senator HATCH. When you talk about "authoritative disposition," are you talking about the court making those determinations? Who makes them?

Ms. CHAYES. I think I can say from my reading of the title VII cases that the issue is so unlikely to arise in that way that you do not have to worry about it.

Senator HATCH. How do you distinguish between a compensatory or a preferential admission? You have been talking about the two. How do you distinguish between them?

Ms. CHAYES. I think preferences for a previously discriminated against or protected class, as they call it under title VII, has to be justified as representing remedial relief in a specific situation of proven discrimination. Most often this is done not by court decision but by consent decree.

So that if you have previously excluded Hispanics or whoever——

Senator HATCH. Then it has to be done through the courts.

Ms. CHAYES. There are cases under title VII where the remedy has included compensatory action for the class discriminated against. I just do not see those cases as being imported into the ERA, and I certainly would not put forth an interpretation that would suggest that be the case.

I can imagine, you know, a situation on benefits or something of that sort as in *Schlesinger* v. *Ballard* where there was some so-called preferential treatment. I would not want to, at this point, predict as to what other compensatory treatment might occur.

But if you are worried specifically about hordes of women going into the service academies, I do not see that as a problem, Senator Hatch.

Senator HATCH. Well, I think this is an important question because you seem to be saying that compensatory affirmative action in admissions are OK while preferential admissions are not. Am I right?

Ms. CHAYES. No. All I am saying is that I am defining affirmative action and saying that that is an area that I can foresee that sex differentiation in treatment might be justified, but only under the strictest of scrutiny by the courts, and then you are saying, "Well, what are the fact situations in which you could imagine this taking place?"

And I said, "A situation like *Schlesinger* v. *Ballard* where the issue was differntial time for promotion. That is a situation in which I might foresee compensatory treatment taking place."

I do not particularly see vastly greater numbers of women being admitted to service schools, as compensation for past discrimination, particularly after the *Bakke* case, but I would rather leave the constitutional experts to deal with a set of hypotheticals in which affirmative action might or might not be permissible.

Senator HATCH. You are saying that the ERA then is not absolute——

Ms. CHAYES. Pardon?

Senator HATCH. Are you saying that the ERA should not be interpreted in the absolute fashion that many suggest it would be?

Ms. Chayes, I think most of the people who have looked at the ERA feel that there are, in constitutional interpretations, two areas that have to be really looked at further, and one of them is the area of affirmative action and the other one is that whole area involving physical characteristics.

Mr. COHEN. It seems to me there are a number of points to be made here. One is that some very critical decisions about who becomes an officer or who gets promoted would now be handed over to the courts.

These are matters which have an enormous practical impact. They are, as I said earlier today, matters of life and death, and one of the questions we have to consider is whether we want those kinds of decisions to be made on the basis of narrow constructions.

There is an additional point here as well, that although I certainly agree that the strictly legal constitutional aspect has to be considered, ERA would have a practical impact so that even if it would not mandate affirmative action programs of the kind that I might be concerned about, it would tend to have that effect.

I think one of the best examples we have of that is the changes that have been forced on the Army which has tried to establish some gender-blind weight lifting characteristics. Now, initially as a result of the women in the Army policy review, a number of military occupational specialties were effectively closed to women because they defined certain jobs as being very heavy, requiring the lifting of 100 pounds or more. These standards were objectively based. They used very elaborate means of validation, which included such things as weighing the ammunition boxes that certain specialties required that one lift, ammunition boxes which weigh 120 pounds as it turns out.

Now, what happened was that there was an enormous amount of pressure put on the Department of Defense by feminist groups. As a result the standard was lowered to 80 pounds, and furthermore female soldiers who did not meet the standard, who did not meet the 80-pound standard, could still choose that specialty, but they would be counseled against doing so.

This is a respect in which you see what the practical political consequences of ERA would be even leaving aside some to the constitutional questions.

Senator HATCH. A comprehensive article in the Yale Law Journal, concerning the ERA and the military, concluded that it is "unclear" whether or not entire housing facilities could be kept separate between men and women in the military. Do you agree, Ms. Chayes, with that conclusion?

Ms. CHAYES. I think that is a silly outdated discussion, because I think there are practical ways to meet privacy needs under any circumstances. I will cite for you the adjustment of the Air Force Academy, where, in the end, unit cohesion, by the way, was deemed very important and it was felt important to have women living essentially with their units.

And the adjustment that was made was to put women around the corners in their dormitory so that the women were clustered facing outward to their units in two directions yet they were clustered together in one corner.

There are always ways to deal with the needs of privacy, as the prison cases, for example, have shown under title VII, and in combat conditions in the field as our Reforger exercises have shown, those accommodations can be made. I think that is just a silly issue.

Senator HATCH. What about situations in the field?

Mr. COHEN. I completely disagree with the idea that this is a silly issue. The Army has actually spent quite a bit of time studying the construction of barracks. Awhile ago, and this had nothing to do with the introduction of women, the Army began to construct barracks in which men had suites, four men to a room. There was much more privacy than in the old days where there would be the long squad bays that I am sure you are familiar with.

It was found that this had a detrimental effect on unit cohesion, because previously what happened there was a lack of privacy which was a good thing in terms of building up unit cohesion at quite a low level. This is, by the way, a practice in which the Marine Corps has continued to differ from the U.S. Army.

If I could just add one last point, one thing I would like to see very much is a discussion of how the Marine Corps, which adheres to much more traditional policies, which has many fewer women relatively than the Army, has managed to maintain a very high level of cohesion for precisely the reasons that I have indicated.

Senator HATCH. Is your statement, Ms. Chayes, consistent with the statement you made earlier that any classification based on sex, just as race, will be unacceptable? Certainly a policy of separate but equal would be unacceptable today in the military as between blacks and whites.

Does the ERA equate sex and race discrimination or does it not? If it does, then there is a real question as to whether Professor Cohen is right?

Ms. CHAYES. But separate but equal, I think, means quite a different thing when you are talking about job opportunities and you are talking about education——

Senator HATCH. We are talking about housing right now.

Ms. CHAYES. If you are talking about physical characteristics and the notion of privacy, I think that sex and race cannot be equated. The reason I say it is a silly issue is because I have a great deal of personal experience there.

As a college dean, I integrated, as it were, the dormitories of my college and did a study of coeducational housing throughout the country. As Assistant Secretary, I made sure, for safety reasons among other things, that our dormitories were integrated, men and women. We managed to do this and preserve privacy, and at the same time to preserve the unit cohesion.

Maybe the Air Force has a very different concept of all of this, in fact, it probably does, than the Army. But there it is. And the issue of separate but equal never arose because they were not really separate and they were certainly equal.

Senator HATCH. The issue of separate but equal came up as a result of the utilization of facilities. If you are going to equate race discrimination with sex discrimination, do we not run into the same problems with regard to military facilities?

Ms. CHAYES. They are not comparable. You are really talking about apples and oranges. We are talking about separate but equal in the *Plessy* v. *Ferguson*, you know, blacks at the back of the buses; you are talking about a very invidious discrimination. When we are talking about separate but equal school, we are talking about a stigma of bad schools for blacks, and that is the context out of which *Brown* v. *Board of Education* arose.

Senator HATCH. Or restaurants or military facilities or whatever. In race, the old doctrine of separate but equal does not apply any more. You said that sex would be elevated to the same type of classification as race.

Ms. **Chayes**. Now, if you want to carry this over to segregation by sex, if you were talking about dining facilities, if you were talking about anything that did not relate to a notion of privacy, I think you would be exactly in the same position of stigmatizing women. Somehow whatever these facilities were like, they would be considered somehow inferior. I think you cross that barrier when you say there are different physical characteristics. Men and women do not have to shower together. They do not have to use the same bathroom, although that is not the most horrible thing in the world. But we want to preserve a certain sense of privacy because of these differences in physical characteristics, without carrying a stigma. I think in this area you might see some things that depart from the analogy that we have been pressing so hard.

Senator **Hatch**. This right of privacy exception which you are relying on, is it contained anywhere within the provisions of ERA? What if you happen to be wrong?

Ms. **Chayes**. I think the right of privacy—without getting in over my head on constitutional interpretations—has been read into the interstices of the entire Constitution.

Senator **Hatch**. From where?

Ms. **Chayes**. Well, if you go back the genesis of the Brandeis and Warren article of 1911 or 1912 and go all the way through the first amendment cases—I am embarrassed that I do not remember the name of the case.

Senator **Hatch**. Well, I do not expect you to do that.

Ms. **Chayes**. But these are cases in which the freedom of the press is posited against some inchoate notion that people are entitled to maintain their personhood.

The woman who did not want her picture on the bag of flour, whatever that case was, and that inchoate notion of privacy tempers the absolutism. I think in terms of a military situation, the closer you get to battle, the more minimal it is. It may come down to the fact that men and women do not have to shower together.

Senator **Hatch**. Mr. Cohen?

Mr. **Cohen**. A number of points. First, the issue of housing is not as Ms. Chayes initially suggested a trivial one. In fact, that was what was at the heart of a lot of civil rights legislation with respect to racial integration. Housing is a very important matter.

Second point. Privacy is good in the civilian realm, and here let me again return to this distinction which is critical between what military organizations do and what civilian organizations do.

Privacy in the military can be a bad thing, and in fact, military organizations deliberately deny soldiers privacy. That is the logic behind the squad bays where everybody can see one another.

Now, Ms. Chayes said that men and women do not have to shower together. The question to be asked is, well, what would be wrong if they did, and I think Ms. Chayes would probably believe that there would be something bad, likely to happen if they did shower together, and that, in turn, open up a whole set of questions which do come to bear on the issue of cohesion which I raised at the very beginning.

Ms. **Chayes**. You have to shower together to have unit cohesion?

Mr. **Cohen**. You say they do not have to shower together.

Ms. **Chayes**. No.

Mr. **Cohen**. My question is what is wrong with them showering together?

Ms. **Chayes**. Nothing.

Mr. **Cohen**. There is nothing wrong with men and women showering together in the military?

Ms. **Chayes**. If they want to, no.

Senator **Hatch**. Well, like I say, it is easy to make fun of this issue. But if race is equivalent to sex or sex is equivalent to race as a classification under constitutional law, then these are very real issues. In my study of constitutional law, the right to privacy really never emerged until 1968, and was not really incorporated into real law, enshrined in the law until the abortion decisions.

Ms. **Chayes**. No, no, sir.

Senator **Hatch**. Yes, yes, ma'am.

Ms. **Chayes**. I mean, these are issues that existed——

Senator **Hatch**. *Griswold* was the first case where the court extended a right of privacy under constitutional law. I think if you read it, you will find that is correct. I know it sounds curious to talk in terms of men and women showering together—I personally hope that would not be the case—but if we take your statement that gender must be treated like race, then you run into these legal problems.

Let me move on, though, because we just have a few more minutes. If it were decisively established, to pose a hypothetical, that full integration of men and women in the military posed disciplinary problems, would the ERA allow this fact to be considered in implementing personnel or other corrective policies?

Ms. **Chayes**. I do not accept the premise so I have a hard time dealing with the answer. I mean, disciplinary problems have to be dealt with. But if you want to go back to the analogy with race, would you permit segregation, Senator Hatch, if it was demonstrated to you that white people beat up black people if they are living in the same dormitory? Would you then say for discipline, it would be necessary to eliminate the black people from the dormitory? I do not think you would argue that. You deal with the disciplinary problem and you would educate the people. No, you cannot beat up black people. No, you cannot harass women sexually. You cannot rape them, and if you do, you are going to get into trouble. You do not remove the women.

Mr. **Cohen**. I would just point out that the problem of discipline is not wildly hypothetical. That issue has been, in fact, the major concern of all armies which have incorporated women; it is a very serious question. My view is that the equal rights amendment would not allow us to backtrack if the disciplinary problems were substantial. And in fact, I think Ms. Chayes answer just now indicates to you that if it turned out that I was right, the testimony which I have presented based on the historical and sociological evidence that is available to us, if that view is right, it will make no difference under the equal rights amendment.

Senator **Hatch**. What about situations in the field where separate facilities are not available for men and women?

Ms. **Chayes**. I am trying to say that the sexes are integrated almost entirely now. I do not understand the open bays. Maybe there is something about the Army that is so different from the service in which I had my experience, but I thought open bays were essentially a thing of the past except for basic training, even in the Army. That is just not a way under an All-Volunteer Force that you can keep anybody in.

That is my understanding. I perhaps stand corrected. I think you make accommodations to privacy. We have just put up a female astronaut in very close space, and accommodation was made for Sally Ride. The unit cohesion was absolutely marvelous, and the mission was an enormous success.

I really do not understand why a pragmatic adaptation to the problem is not entirely just a commonsensical issue, rather than a constitutional issue.

Senator HATCH. All I am suggesting is that if they are equated and that sex rises to the same level of suspect classification as race, then you run into these problems. You cannot avoid them.

Mr. COHEN. These are not commonsense problems, because they would be the result of a policy which, as I said before, is utterly unprecedented. No other military organization in the world has ever done the kinds of things that would be mandated under the ERA.

If I could just make the point about the open bays which seems to be an issue of contention, the open bays like a number of other seemingly primitive, seemingly irrational things such as bayonet training, are things that the Army is returning to, and for good reasons, for reasons that have to do with the cultivation of aggressiveness and unit cohesion among its soldiers.

When soldiers live together in an open bay, there is no privacy. They are all together. They see one another all the time.

Ms. CHAYES. Are they going away from married enlisted?

Mr. COHEN. No, but this is one of the concerns that the military has about an enlisted force which is very largely or has a high proportion of married people, where soldiers do not live together in the same barracks, and that is one of the reasons to be concerned.

Again, let me give you the example of the Marine Corps which has, in many ways, set the model which the Army is trying to return to for the cultivation of cohesion in military effectiveness.

Senator HATCH. Ms. Chayes, on page 14 of your written statement you state that, "In my view, gender-based restrictions serve very little purpose." Do they serve any purpose, in your opinion?

Ms. CHAYES. I cannot think of any.

Senator HATCH. Under the ERA will the military always have to apply identical standards to men and women? Will this apply to both physical and mental standards? I think you have indicated that it will.

Ms. CHAYES. Right. Again, the standards have to be related to the job, and the people have to meet the standards.

Senator HATCH. We know that. But they would have to be applied equally is what you are saying?

Ms. CHAYES. Yes.

Senator HATCH. Will the military have to apply mental standards to men and women on the same basis?

Ms. CHAYES. I should think that would be an excellent idea, and it again would be job related.

Senator HATCH. Will the military have to apply physical standards equally to men and women?

Ms. CHAYES. The answer is yes, but let me explain that because I know, Senator Hatch, that you are concerned with the notion that standards are being lowered so that women can be included.

Senator HATCH. That is right.

Ms. CHAYES. And I think that is a legitimate fear, but I do not think you have to worry about that, because in the instances that many people have cited, the standards were really not job related so that if you take a look at the Army and the lifting 100 pounds, it really turned out that the men were having a hard time meeting those standards and they were not necessary for the job.

The Air Force has had identical standards for a long time, and they are very much job related.

Mr. COHEN. Those standards were job related. It was not just the question of carrying the boxes of ammunition, although that was part of it.

Senator HATCH. They were 120 pounds?

Mr. COHEN. Yes, those were 120 pounds, and this is a very well validated set of criteria. I urge you to take a look at the women in the army policy review which spent an enormous amount of time trying to classify military jobs. Again, the problem is going to be one of sort of creeping standards. For instance, pushups. No combat soldier has to perform pushups on the battlefield. Pushups are a way of measuring something which is important on the battlefield, namely, upper body strength.

But you are not going to come up with a set of tasks like carrying the body of a wounded comrade or manhandling an antitank missile into position which will be amenable to the kinds of standards military organizations have to have.

So what you do come up with is things like pushups or a 2-mile run. Nobody is going to run 2 miles on a battlefield, but it helps you measure things like stamina.

And what will happen is because those standards do not directly and immediately correlate with any particular combat job, there will be pressure to dilute and weaken those standards, as there already has been at the academies. There already has been detoriation in the physical strength standards that we have.

Even if Ms. Chayes were right and the 80-pound standard is the correct one, then why not hold the line and insist that women cannot enlist in a specialty if they cannot lift the 80 pounds?

Senator HATCH. This has been an interesting interchange and I want to compliment both of you. Let me just bring up two other questions in this area.

Ms. Chayes, will the military be permitted to maintain its present mental and physical standards should ERA pass or would it have to lower those standards? Are existing standards satisfactory?

Ms. CHAYES. It may, in fact, raise the standards. I mean, the mental standards for men have been lower than the standards for women or the surrogate standards. I mean, there are standards other than mental and physical things such as high school education.

So I think there are real questions as to whether these are good standards in general at the moment. I mean, the last time I looked at it, there was a lot of questioning of the standards in any case in the way of getting predictable performance out of those standards.

But the answer is that the standards will not be gender based.

Senator HATCH. Will the military be permitted to maintain its present height standards if ERA passes?

Ms. CHAYES. The height standards will have to be demonstrably related to the job, and my guess is that there could be differentials just as with strength tests. Take the DMZ for example. When I was at the DMZ in Korea, the army patrols were all about 6-3 and very burly. My guess is for that particular assignments for specific psychological warfare purposes there could be a continuation, but these would be subjected to strict scrutiny to make sure they were not a mask for discrimination.

For other kinds of jobs, say, dealing with maintenance of aircraft, height standards might not be relevant, and be abolished.

Mr. COHEN. If psychological warfare standards are the standards that Ms. Chayes would like to apply, then you have problems with having women in the military at all because every study that has been done of foreign attitudes toward the American incorporation of women into the Armed Forces has been uniformly negative.

It decreases the deterrent effect of the U.S. Armed Forces. I am referring in particular to Colonel Partlow's paper on "Women in the Military" which has a fairly extensive survey of European attitudes, of Soviet attitudes, and of Asian attitudes.

In each case they reduce the image of the effectiveness of the United States, and that means if we do adopt this psychological warfare standard, that we have problems with the number or percentages of women that we have in the military today.

Ms. CHAYES. But the psychological warfare was one of specific appearance in front of an enemy of small build. There was no fighting going on. In fact, the image of women fighting might actually terrify and confuse the enemy. How do you know?

Mr. COHEN. Well, because we do know what they say in their press. Their discussions are contemptuous and people are not normally contemptuous of something they are terrified of. The two things are quite analogous, because what we are talking about is deterrence, deterrence on the DMZ of North Korean military police provoking incidents, in the larger picture deterring military conflicts launched by other states.

So I think the two issues are quite analogous and I am glad that Ms. Chayes brought the issue up.

Senator HATCH. Let me ask one last question. Ms. Chayes, you alluded to the method of disparate impact analysis to be utilized under the ERA. It was my understanding that the 14th amendment does not apply the disparate impact analysis to distinctions between race. I am thinking in particular of the *Washington* v. *Davis* case, the *Arlington Heights* and the *City of Mobile* cases where the disparate treatment analysis was not applied to distinctions between races.

What will be the appropriate standard of analysis under the ERA? The intent analysis as exists under the 14th amendment or the disparate impact analysis that has been advanced by certain civil rights groups?

Ms. Chayes. If I may, Senator, that is a scholarly question on *Washington* v. *Davis* and the *Arlington Heights* case that I would rather answer in writing along with putting in, if I also may take this moment, the NORC data that I had mentioned earlier. I would like to submit that in writing. It is a very difficult problem.

Senator Hatch. It is a very difficult problem. You did say the disparate impact analysis applied in your paper.

Ms. Chayes. Yes.

Senator Hatch. But I agree with you. It is very difficult.

Ms. Chayes. Right, and I want to do that question justice if I may.

Mr. Cohen. I would just add that it is not simply a scholarly question. It is also a political question. The way this trickles down into Congress and the bureaucracy is whether or not it is a good idea from a constitutional point of view based on disparate impact analysis. That is really the criterion that people use.

Senator Hatch. Just one last question. Professor Emerson has observed that under the ERA, mental and physical tests for the military must be "neutral," to insure that they "do not operate to disqualify more women than men." Now, will such neutral policies be required under the the ERA?

Ms. Chayes. Such neutral policies will be required under the ERA.

Mr. Cohen. Such neutral policies are not, in fact, neutral because what they will end up doing is requiring the military to alter its standards and thereby alter the composition of its force. I think that is a particularly important point.

Ms. Chayes. That is not what neutral standards means.

Mr. Cohen. In the context of the article, I think it is.

Ms. Chayes. Not at all. A neutral standard says "let the chips fall where they may." Those who can meet it can meet it, and that is where the disparate impact analysis comes in. The disparate impact analysis would get you to the point where justification is required. If you add on top of that the *Washington* v. *Davis* rationale, you have a somewhat different picture.

But nevertheless, given the whole history of interpretation, I think that you are not going to be left with a 50-50 situation as you imply, as you have implied throughout the entire testimony.

Senator Hatch. Then you disagree with Emerson then?

Ms. Chayes. No, I think——

Senator Hatch. He is really talking about the disparate impact analysis in his comments. Or do you agree with Emerson?

Ms. Chayes. Read me that part of your sentence. I probaby disagree with it.

Senator Hatch. Professor Emerson has observed that under the ERA, mental and physical tests for the military must be neutral to "insure that they do not operate to disqualify more women than men." Do you agree with that?

Ms. Chayes. No. I do not agree with that, but I think my attitude is that the disqualifications must be demonstrably job related, even if more women are disqualified from a particular job. There has been a long history of disparate impact since Professor Emerson wrote. I think we have got to accept the consequences of the job relatedness of the requirements. I am prepared to accept it as I think most ERA proponents are.

So I think that is an unfortunate phraseology.

Senator **Hatch**. I am not sure most proponents are in agreement with you on that point, but be that as it may.

Mr. **Cohen**. Personally, I think Professor Emerson's view is correct. I would also point out that I do not think it is a question of letting the chips fall where they may, because otherwise how does one defend affirmative action in the military, how does one set limits on it.

The issue is not letting the chips fall where they may. What is in vision is something much larger than that.

Senator **Hatch**. Ms. Chayes has to leave. I appreciate both of you being here this afternoon. You have been excellent witnesses, and I think you both have helped our overall perspective concerning the equal rights amendment.

With that we will recess until further notice.

[Whereupon, at 2:50 p.m., the subcommittee recessed at the call of the Chair.]

[The following was submitted for the record:]

QUINCY HOUSE
HARVARD UNIVERSITY
CAMBRIDGE, MASSACHUSETTS 02138

OFFICE OF THE ALLSTON BURR SENIOR TUTOR

2 November 1983

Senate Judiciary Committee
Dirksen Senate Office Building
Room 224
Washington, D.C. 20510
Attn: Mr. Dick Bowman

Dear Mr. Bowman:

I am submitting herewith my responses to the questions posed by Senator Strom Thurmond.

1. I referred to a number of studies in my testimony, which in turn make numerous references to other studies. The primary difficulty here is that the United States military does not have its own in-depth studies because we have never placed women in combat in the ways envisioned by the Equal Rights Amendment. I have a hunch that such studies might well have been done in Israel, and I will shortly suggest to Senator Hatch that an effort be made to secure from the Israeli military command studies, if there are any, on this matter.

2. Women might well make better teachers than men or administrative and clerical workers. Certainly, I do think that nursing, which is traditionally a woman's field is an area where they make a tremendous contribution.

3. The results of such non-military attachments between men and women would be disastrous: again, I refer you to my testimony and the attached footnotes. The problems of sexual harassment, jealousy, romantic entanglements, and sheer lust that develop would exercise a pernicious effect on unit morale. Whereas business organizations can cope with such problems by moving personnel around, or even firing them, the military operates under much tighter constraints. Moreover, businesses are not, as the military is, total institutions in which the employees have to live as well as work together.

4. As the fathers of small children have been drafted in the past, so, in the future, under the ERA, the mothers of small children would also be drafted.

5. As Ms. Chayes and others have argued, no special provisions could be made for mothers as such. There might be provisions for parents of small children. This in itself would be a change, because the military takes no cognizance of the parenthood of its members. To do so would be to add one further massive administrative complication to a host of problems that would be imposed by ERA.

6. If one believes that ERA will be passed by both Congress and the states, it is imperative to amend it along the broadest possible lines, excluding the military from its purview. As I testified yesterday, ERA will remove any and all gender-based military distinctions. The results will be catastrophic for the fighting efficiency of our armed forces.

I hope that these answers satisfy you. If they do not, I would be happy to amplify them.

Sincerely,

Eliot A. Cohen
Assistant Professor of Government
Allston Burr Senior Tutor

RESPONSES OF ANTONIA HANDLER CHAYES

TO QUESTIONS OF SENATOR THURMOND

Q: Ms. Chayes, in your statement you mentioned that women have become so integrally involved in the operation of all branches that in the event of a national emergency that the drafting of women is inevitable.

Do you mean that women are now so essential to the operation of combat units such as artillery and armor that it would be necessary to draft women in order for these types of units to respond to an emergency?

A: Women are currently excluded from certain Army units, such as armor and some artillery units, so it would appear that there exists now the capability of filling their ranks with a completely male pool. That may or may not remain the case into the future, but even assuming it does, it must be remembered that such units do not operate in a vacuum.

For an Army to function properly, all positions, in all kinds of units, must be filled. Past drafts have inducted men to serve in the full range of positions -- not only for so-called "combat" units or only for units which are currently closed to women.

Furthermore, it is now clear that future drafts are not going to be used to induct masses of untrained people. We are now committed to maintaining a sufficiently standing army plus active reserves in order to mobilize quickly. Future drafts are going to be of specialty-skilled people needed to fill technical positions. Personnel shortages are expected in some technical and medical fields -- and, in fact, legislation has been prepared by the Department of Defense to facilitate the drafting of both males and females with medical skills, should a national emergency arise.

Q: You also stated that the experience of the last several years has shown fears about the sexual integration of the military to be groundless. You then go on to cite the large numbers of women who are now participating in the different branches of the service. What experience are you talking about? Has there been any combat experience on which to base your conclusion? How can the existence of large numbers of women in the military during peacetime show us anything about the possible performance of the military during actual combat?

A: First, we indeed do have experience with how women perform in combat. Women have served in every combat theatre of every American war -- North Africa, the Pacific, Europe, Korea and Viet Nam. In all these wars women have had to perform their jobs -- as nurses, as combat support personnel, truck drivers, pilots, and as clericals -- under fire and in the heat of combat. There has never been any report that women performed poorly or abdicated their responsibilities in such situations. I commend to you Jeanne Holm's book Women and the Military: The Unfinished Revolution for a good summary of the roles women have played under fire.

Furthermore, although women may now be serving in some "new" roles within the active combat context, training in time of peace is precisely designed to prepare soldiers for combat. The military's ability to predict wartime success from the results of peacetime training, studies and tests is given. Were that not true, battle strategies, weapons use, and other manpower utilization decisions could never be supported.

All tests show women perform well and do nothing to impair the ability of military units to function. There is simply no reason to believe otherwise.

Q: Ms. Chayes, some authorities suggest that under the ERA some segregation of military living quarters and facilities might be allowed. However, privacy considerations between the sexes may be hard or impossible to provide in combat situations. Do you think that women serving in combat units have a legitimate expectation of personal privacy? If so, what are those expectations?

A: It is true that sleeping and bathing facilities would, in the interests of privacy, be segregated in the military as elsewhere, although such accommodations would have to be carried out as consistently as possible with the principle of equal rights. Thus, a general reliance on policies of segregation which was broader than necessary to meet such privacy interests would be disallowed. This balancing is not a new or particularly difficult problem for legislatures or the courts. The experience of state governments and courts in accommodating the rights of prisoners at the same time as providing equal opportunities for prison guards will be a useful parallel.

It is important to stress that such privacy rights inhere to both men and women -- so that any policy which sought only to accommodate the interests of one group would itself be discriminatory.

In fact, women and men have in the past, and will again, work together under difficult combat situations and successfully addressed privacy issues. It is unfair to ignore the most difficult circumstances under which medical personnel have had to perform wartime duty, by raising the issue of privacy as though it would be a new problem. As with the recent shuttle mission, and the long history of participation of women in combat theatres, such accommodations will be successfully made.

Q: In the now famous Yale Law Journal article on the Equal Rights Amendment, the authors state that the proposed amendment would allow no exceptions insofar as the military is concerned and that men and women must therefore be treated exactly the same with one exception. They suggest that pregnancy would justify slightly different conditions of service for women. Could you elaborate on this and tell us what these different conditions of service might involve?

A: Under the ERA, classifications based on physical characteristics unique to one sex -- such as pregnancy -- are not absolutely prohibited but must be strictly scrutinized to assure that they do not undermine the equality of the sexes. Thus, special policies relating to pregnancy would not necessarily be prohibited, but would, if challenged, have to be shown to be necessary to the efficient operation of the armed services or another compelling governmental interest.

In fact, policies specific to pregnancy will rarely, if ever, be absolutely necessary. Pregnancy can be, and generally is now, treated as any other disability preventing a soldier from performance of his/her duty. Automatic discharge for pregnancy has been abandoned as a policy of the services, in fact, now most branches are seeing that it is necessary to have policies in place which encourage and even require skilled women soldiers to remain in their jobs.

Q: It has been suggested that one of the "benefits" of the impact of the ERA on the military will be the increased availability of the means of birth control to women who are below the poverty line. Ms. Chayes, do you see the distribution of the means of birth control through the military as an important reason for the passage of the ERA?

A: No.

Q: The Report of the International Women's Year Commission suggests that women would not be assigned to combat duty because the military would not assign women to duties that they were not capable of performing. The U.S. Commission on Civil Rights, on the other hand, has taken the position that excluding women from combat duty would deprive them of important training and benefits -- the Commission apparently believing women would be in combat. To which view would you subscribe, Ms. Chayes, and why?

A: As my written testimony explains, explicity gender-based assignment policies would not be tolerated after the ERA. Such policies would have to be replaced with neutral job criteria.

To the extent that some jobs might have strength criteria difficult for many women to meet, and assuming that critaria could be validated as truly job-related, it might well be that fewer women would "benefit" from training and education attached to those specialties.

However, it is not correct to conclude that women would not gain from the removal of the current sex-based assignment barriers generally. Many of the jobs closed to women because of the "combat exclusion" policies do not reflect any requirement of strength in performing the jobs -- the best examples being the rules preventing women from performing any job on a combat ship or from serving in combat airplanes.

RESPONSES OF ANTONIA HANDLER CHAYES

TO QUESTIONS OF SENATOR DeCONCINI

Q: Under the Constitutionally-based doctrine of "Military Necessity", the courts have generally deferred to the Congress and the Executive in matters of national security.

Will the ERA restrict the discretion of Congress to implement policies it feels will foster national security?

A: Congress must always take the full Constitution into account when making legislative decisions; it cannot ignore all other protections even when making critical national security determinations. For example; there is no question but that the maintenance of racially segregated units would now be considered indefensible -- Congress is required to find ways to accommodate such important Constitutional values. The same thing would be true under the ERA. Explicit exclusionary policies on the basis of sex would be prohibited under the ERA; and, in fact, are completely unnecessary to any national security interest.

Q: After adoption of the ERA, would it be possible for the Congress or President to create a gender-based classification if in the view of Congress or the President such classification served to foster an important governmental objective -- i.e. national security and the classification was substantially related to the achievement of the objective?

A: The terminology used here -- an "important governmental objective" and "substantially related" -- is language describing the current standard for analyzing sex-based classifications articulated in the case of Craig v. Boren. One of the most important policies embodied in the ERA is the policy that sex-based classifications are so necessarily broad-based and likely to perpetuate the great harm of acting on the basis of sex-based generalizations instead of individual characteristics and abilities that such classification by the government can only be permitted in two rare and narrowly circumscribed circumstances. Those exceptional circumstances I will simply denote here. One is the circumstance in which a gender-based classification is carefully employed to remedy past gender-based discrimination. The other involves regulation based on unique physical characteristics. For regulation of unique physical characteristics, the government must have a compelling legitimate objective that can only be served by addressing laws or regulations to persons possessing unique physical characteristics at issue, a sperm donor for example. To meet the strict scrutiny, the government must show (1) that the law or regulation serves a government interest that is indeed compelling, and (2) that the regulation is narrowly crafted only to serve that interest and not to impinge on the rights, interests, and opportunities of the group possessing the unique physical characteristics in question. A unique physical characteristics regulation that disadvantages members of the group possessing the regulated unique physical characteristics from members of other groups with respect to characteristics or factors not unique but common to all -- for example, economic, social, political, educational needs or opportunities -- would be subject to the requirement that the least disadvantaging means possible be used to serve the compelling government objective.

Beyond these two narrow circumstances, sex-based classification is always too broad a means to serve a government objective and, thus, after ratificaiton of the ERA must be replaced by other sex neutral means of achieving the government's ends. A particular sex-neutral policy, of course, might fall under the ERA as well if that did not serve a compelling government interest and operated disproportionately to exclude one sex or the other in a way that tracked presumptions about differences between the sexes.

Q: Prior to 1948, the military had segregated units based on race. Could either of you comment on either the wisdom or the legality of having segregated units, combat or support, based on sex?

A: In the same way that the 14th Amendment would not tolerate racially-segregated units, sexually-segregated operating units would be prohibited under the ERA.

Separation on the job to avoid problems of sexual harrassment or of male discontent would be indefensible since there are other, more positive means of addressing such problems. As was found with racial integration, it is clearly the case that men will show respect for women with whom they have trained and served, if the leadership for such respect is provided.

Q: Mr. Cohen has commented that certain psychological factors involving "bonding" and a male soldier's perception of, in his words, "our women" may impact negatively on a unit's cohesiveness and efficiency.

If the ERA were in effect, could the Congress or the Military commission studies into this of "psychological ramifications" and if the results indicated that the presence of women might have an adverse impact on a unit's combat ability, would it be possible for Congress to set policies, based on these studies, that would exclude women from combat?

A: It should be noted that these same arguments about potential negative effects on unit cohesion were used to justify a racially segregated force. They were unsupported by evidence in the racial context and are similarly unsupported here.

The services have done repeated studies on the effect of the women in combat and combat support units and have never established any empirical data to support claims that, for psychological or any other reason women have an adverse effect on performance.

Claims that women interfere with crucial "male bonding" processes are specious, based on subjective and biased reporting, not on fact. Such ideas should be laid to rest.

However, it is clearly within the powers of Congress and/or the service branches to work to determine how best to manage an integrated force. In fact, the establishment of programs specifically designed to address problems of mistrust, sexual harassment, and other resistance to sexual integration would be entirely consistent with the ERA's purpose, and might well be required. The services are fully capable of designing and implementing such programs, as they have of necessity done in the area of race relations.

Q: It has been argued that the right to privacy might exclude women from at least some combat duty if sexually segregated sleeping quarters or other such facilities could not be provided or enforced.

Would it be your position that such considerations might justify the exclusion of one sex from a combat situation in which even minimal privacy is not possible, but that such considerations would not justify a general reliance on sexually segregated combat units much less the arbitrary exclusion of women from all combat units?

A: Certainly it is not necessary, and would be violative of the ERA, to rely on general policies of segregation or exclusion to accommodate constitutionally-protected privacy rights. Any policies designed to protect privacy interests would have to be drawn as narrowly as possible so as to assure that they do not serve to curtail women's participation by perpetuating past exclusions.

It is important to understand that women have been placed in difficult living situations in all American wars; that they have lived out of helmets, gone without bathing, slept in tents and shared sanitary (or unsanitary) facilities with men. Nurses in evacuation and MASH units have dealt with lack of privacy and have functioned professionally. As has been shown with the recent space shuttle mission, teams of people working together can design privacy strategies which work. We have every reason to believe that the services can devise methods of preserving basic privacy rights without denying women full opportunity to serve their nation.

Q: There seems to be general agreement that if the ERA is adopted, obvious and explicit gender-based exclusions will fall in favor of sex-neutral tests such as strength or endurance requirements. In a post-ERA environment, would men and women have to attain the same minimum passing scores on physical fitness tests in order to be deemed qualified for service?

A: Tests measuring qualifications would have to be administered and scored on a sex-neutral basis. Moreover, cut-off scores would have to be treated equally. Confusion in this area comes from three sources:

1. Claims are made that physical standards for the service academies have been lowered to accommodate women. It must be noted here that the "standards" spoken of here are not job-related criteria, but rather the requirement that officer candidates be physically fit to the optimum of their capabilities. In that instance, replacing male and female standards with individualized standards would rid the policy of its gender-base and do no harm to the ultimate desired "product" -- officers who are physically fit.

2. It is assumed that there is a single accession or post-basic-training physical standard which, by itself, can bar or admit a candidate to a particular job. In fact, individuals may have a variety of scores on mental and/or physical tests which must be looked at as a whole. Thus, an individual with a lower physical capacity, but a higher education level, may in fact, be a more desirable candidate for certain positions or even overall. Under ERA, such variation will still exist; as long as all candidates are considered under the same criteria.

3. It is also assumed, in error, that such standards which do exist are validly job-related and are held constant over time. ERA will mean that for the first time, criteria which truly reflect the content of the job at hand must be established. Secondly, "standards" do now, and will in the future, shift according to the capabilities present in the available pool of recruits.

IMPACT OF THE ERA UPON THE MILITARY

The following interpretation of the ERA was given by Antonia Chayes, former Undersecretary of the Air Force during the Carter Administration, regarding its impact upon the military. Ms. Chayes was selected by ERA proponents as the person best equipped to represent them on this subject at a November 1, 1983 Senate hearing.

(1) Principle-- Under the ERA, all gender-based distinctions in military law and policy would have to be eliminated.

(2) Draft-- The present system of draft registration, limited to males, would be unconstitutional under the ERA. Restoration of past systems of draft, limited to males, would also be unconstitutional.

(3) Deferments-- Deferments from the draft on the basis of gender based distinctions, such as motherhood, would be unconstitutional.

(4) Combat-- The current 'combat exclusion' for women in the military would be unconstitutional. No occupational category or position could be denied to females under the ERA.

(5) WACs-- Sex restricted units such as the former WACs, the Army Nurse Corps, and so forth, would be unconstitutional under the ERA.

(6) Military Service-- No gender distinctions could be made by the military services with regard to such matters as recruitment, ROTC eligibility, enlistment standards, age, parental consent, education, and so forth.

(7) Pregnancy-- The ERA would require that pregnancy of females in the service be treated as a "disability".

(8) Academies-- The military academies would have to admit males and females on an equal basis.

(9) Standards-- Mental and physical standards in the military that resulted in fewer qualifying females than males would have to be "justified" and "relevant" and "demonstrably related" to job performance. ("I would ask whether 40 pushups or 60 pushups are required to do most jobs.")

(10) Affirmative Action-- The ERA allows "affirmative action" programs for women in the military. "Preferential treatment" programs, such as relaxed promotional standards for females, would be compatible with the ERA.

(11) Discipline-- Disciplinary problems in the military created by placing men and women together would not justify their segregation.

(12) Discrimination-- Discrimination in the military, under the ERA, will be defined, at least in part, on the basis of the 'effects' or 'disparate impact' model of discrimination, rather than on the basis of the purpose or intent of an alleged discriminator.

(SUBCOMMITTEE ON THE CONSTITUTION)

WEAL
Women's Equity Action League

Specialists in Women's Economic Issues

WEAL's Information Center on Women and the Military was substantially involved in the preparation of the testimony by Antonia Chayes, former Undersecretary of the Air Force. The following is our response to the interpretation prepared by the Counsel to the Senate Subcommittee on the Constitution. Our response demonstrates how the principles and impact of the Equal Rights Amendment will be positive and enhance both military readiness and the fair treatment of women as citizens.

Subcommittee interpretation:
(1) Principle-- Under the ERA, all gender-based distinctions in military law and policy would have to be eliminated.

WEAL response:
Explicit gender-based exclusions are unnecessary and serve to include unqualified men while excluding qualified women. Chayes testified, "The military will not be required to utilize soldiers who are unfit or untrainable, but will not be able to exclude women from positions on the grounds of assumed lack of qualifications." This would increase, not decrease, the government's ability to assure that the most capable soldiers were available for any given military job, by enlarging the pool of qualified applicants for positions requiring specialized skills.

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Subcommittee interpretation:
(2) Draft-- The present system of draft registration, limited to males, would be unconstitutional under the ERA. Restoration of past systems of draft, limited to males, would also be unconstitutional.

WEAL response:
Today, the skills and capabilities provided by women are so integral to the efficient operation of all branches of the armed services that, in any national emergency, it appears that the conscription of women is inevitable. In fact, plans for a draft of both men and women with medical skills are already being made. Chayes testified that "In my view, should we move to a draft, I would expect women to be included, even without the ERA, as a matter of military exigency."

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Subcommittee interpretation:
(3) Deferments-- Deferments from the draft on the basis of gender based distinctions, such as motherhood, would be unconstitutional.

WEAL response:
Again, specific deferments based on gender operate to exclude men whose parental obligations should also be considered, while assuming that all women with children are the principle caretakers. Chayes stated that there would be hardship cases and draft deferment based upon the same factors that now prevail. The focus would be on the child, not on the parental relationship. "I think you would find that there would be exclusions, or rather deferments, based upon child care regardless of the sex of the parent."

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Subcommittee interpretation:
(4) Combat-- The current 'combat exclusion' for women in the military would be unconstitutional. No occupational category or position could be denied to females under the ERA.

WEAL response:
The effect of the so-called "combat exclusions" is to control women's participation in the military, while still allowing Congress and the service branches enough flexibility to assure that women will be available when their skills are required. Combat exclusion laws restrict women from certain ships and planes, they do not protect women from war and combat.

805 15th Street NW Suite 822 Washington DC 20005 (202) 638-1961

WEAL response continued:

Behind every combat exclusion lies an exception -- "except" nurses where they are needed; "except" in times of "real" national emergency; "except" when enough qualified men are not available. Under an ERA servicemen and women will be assigned to the positions for which they are most qualified. The test will have to be a test of capability under an ERA and those test results -- not gender -- would be the determining factor. Chayes stated, "I am not for lowering standards. I am strongly for establishing standards that are needed for the job. Where the job needs strength, if it really requires lifting 100 pounds, nobody who cannot lift 100 pounds should be admitted to that specialty."

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Subcommittee interpretation:

(5) WACs-- Sex restricted units such as the former WACs, the Army Nurse Corps, and so forth, would be unconstitutional under the ERA.

WEAL response:

The Women's Army Corps (WAC) was abolished in 1978 and men now make up 31% of the Army Nurse Corps. There are no plans to return to any all female units. The critical question is: How does the presence of women in previously all male military units affect unit performance? Empirical research completed to date shows basically no effect. For example, Army studies have shown that the proportion of women in combat support and combat service support units has no effect on measurable unit performance in field training exercises. Reports on the Navy's Women in Ships program indicate a high level of performance on the part of the women and acceptance by male crew members. Additional concerns about group cohesion if women are admitted are reminiscent of arguments used in the past to justify excluding women and minorities from other occupations, such as law, medicine, police work, and fire fighting.

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Subcommittee interpretation:

(6) Milftary Service-- No gender distinctions could be made by the military services with regard to such matters as recruitment, ROTC eligibility, enlistment standards, age, parental consent, education, and so forth.

WEAL response:

Currently, the Navy requires all female enlistees to be high school graduates; male enlistees do not have to be high school graduates. The Army requires all women to have a high school diploma to enlist, but only 65% of the male enlistees must have a diploma. The Marine Corps requires all female applicants to have a high school diploma or equivalent education to enlist. (The GED is not considered equivalent.) Males, however, only need to have attended school through the 10th grade, and even this standard can be waived by the Marine Corps Commandant for "exceptionally" qualified applicants. The Coast Guard and Air Force have removed all restrictions based solely on gender in education and enlistment standards. Under an ERA these standards would have to be consistent among the sexes even if it meant raising the standards for male enlistees.

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Subcommittee interpretation:

(7) Pregnancy-- The ERA would require that pregnancy of females in the service be treated as a "disability".

WEAL response:

For the protection of force readiness, it would not be necessary for the military to treat pregnancy any differently from other physical conditions which might result in a soldier's inability to perform his or her duties. Reassignment, convalescent leave, and medical care are already in place for those soldiers who become temporarily disabled. It should be noted that statistics show the average woman soldier loses less time from her job, for any reason, including pregnancy, than does the average male soldier. There is thus no evidence that pregnancy is a threat to the readiness of our armed forces.

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Subcommittee interpretation:

(8) Academies-- The military academies would have to admit males and females on an equal basis.

WEAL response:

Women have always and would continue under an ERA to be required to meet the same standards as males for admission to the military academies. Chayes was asked if with an ERA "women must be admitted to West Point on a parity with men." She responded, "Well, if he meant by parity that it would have to be 50-50, the answer is clearly no."

WEAL response continued:

"But if he meant by parity that people, men and women, would have to be looked at with regard to their qualifications, and that there would be no bias in the admissions based upon the realistic qualifications for officers in each of the three services, that kind of parity, I think, already exists."

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Subcommittee interpretation:

(9) Standards-- Mental and physical standards in the military that resulted in fewer qualifying females than males would have to be "justified" and "relevant" and "demonstrably related" to job performance. ("I would ask whether 40 pushups or 60 pushups are required to do most jobs.")

WEAL response:

Chayes testified that "With the adoption of the ERA, explicit gender-based exclusions would fail. Tests of strength and aptitude will have to bear proper relation to the tasks whose qualifications they purport to describe." Personnel will be matched to tasks based upon performance criteria. This would help assure greater productivity and effectiveness. "Where the job needs strength; if it really requires lifting 100 pounds, nobody who cannot lift 100 pounds should be admitted to the specialty." On the other hand, if the Marine Corps really needs high school graduates to operate effectively, then the education standards for male enlistees would have to be raised to the same standards now required for female enlistees, even if it resulted in fewer qualified males.

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Subcommittee interpretation:

(10) Affirmative Action-- The ERA allows "affirmative action" programs for women in the military. "Preferential treatment" programs, such as relaxed promotional standards for females, would be compatible with the ERA.

WEAL response:

Chayes was asked if she agreed with the following statement: "under the ERA, neither sex could be preferred above the other." She responded "If you are talking about straight preferential treatment that compensates for past discrimination and that can be very clearly shown to be that and has to be subject to very careful scrutiny, I think that is allowable."

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Subcommittee interpretation:

(11) Discipline-- Disciplinary problems in the military created by placing men and women together would not justify their segregation.

WEAL response:

Discipline problems among the sexes will have to be dealt with just as all discipline problems are, even those among people of the same sex. Chayes used the analogy of race relations to elaborate. She asked "if it was demonstrated to you that White people beat up Black people if they were living in the same dormitory, would you permit segregation?" "Would you say for discipline, it would be necessary to eliminate the Black people from the dormitory? I do not think you would argue that. You deal with the disciplinary problem and you educate the people. No you cannot beat up Black people. No you cannot harass women sexually...if you do you are going to get into trouble. You do not remove the women."

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Subcommittee interpretation:

(12) Discrimination-- Discrimination in the military, under the ERA, will be defined, at least in part, on the basis of the 'effect' or 'disparate impact' model of discrimination, rather than on the basis of the purpose or intent of an alleged discriminator.

WEAL response:

Where strength and other capability tests come to replace gender-based exclusionary policies, it may be that some physical standards may have the "effect" of disproportionately excluding women. Chayes testified that such an effect will not automatically invalidate such a rule, as long as the standards set are shown to be justified in relation to performance on the job. As Chayes said: (This)"will not place a crushing burden on national security. Indeed, the requirement of providing objective rationale for policies with a disparate impact is not an impediment to national security at all. Our military services bear a burden of strict scrutiny on budget items each year before Congress. They a e well equipped to make their cases when they have strong factual evidence."

Columbia University in the City of New York | *New York, N.Y. 10027*

SCHOOL OF LAW

435 West 116th Street

May 20, 1983

Rabbi N. Neuberger
Jewish Orthodox Coalition Against the ERA
440 Mt. Wilson Lane
Baltimore, Maryland 21208

Dear Rabbi Neuberger:

You requested my opinion whether adoption of an Equal Rights Amendment (ERA) would render unconstitutional the Military Selective Service Act (MSSA), 50 U.S.C. app. § 451 et. seq., insofar as it restricts presidential authority to order draft registration to "every *male* citizen" between the ages of 18 and 26. As you know, in *Rostker v. Goldberg*, 453 U.S. 57 (1981), a divided Supreme Court sustained that limitation against a challenge that it constituted unconstitutional gender-based discrimination. One would expect, therefore, that both proponents and opponents of any new ERA would focus quite explicitly on your question. At this point in time any opinion letter must rest upon the premise that, if adopted, a new ERA would restrict gender-based classifications no less stringently than did the recently expired ERA. On that premise, it is my opinion that an ERA would render the exclusion of women from draft registration constitutionally impermissible.

At the outset I would observe that *Rostker*'s result seems to have been affected by rather exceptional circumstances. *Rostker* reached the Supreme Court for decision after an extensive public consideration of the male-only draft. In 1980, President Carter, acting with counsel of his military advisers, had recommended that the MSSA be amended to allow draft registration for women. Congress refused to amend the statute. 453 U.S. at 72-74. Relying heavily on that Congressional action, the Supreme Court rejected a claim that the exclusion of women from the registration provisions violated the equality mandated by the Due Process Clause of the Fifth Amendment. While seemingly acknowledging that, even under existing constitutional law, gender-based discriminations require some special justification (id. at 69), the Court emphasized that judicial deference to Congress "is at its apogee" in matters of military judgment. Id. at 70. Since the purpose of registration was to secure combat troops, and since plaintiffs made no constitutional challenge to the provisions of existing law making women ineligible for combat assignment, the Court concluded that Congress could exempt women from the duty to register. Id. at 75-83. "Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft." Id. at 78. Three justicies dissented; they insisted that the Court had shown too much deference to Congressional judgment and that the possible permissibility of exclusion of women from combat did not justify a corresponding exclusion from a duty to register.

In my opinion, ratification of the ERA would have required a different result in *Rostker*. That amendment would have mandated that "Equality of rights under the law shall not be abridged by the United States on account of sex." The ERA's legislative history makes plain that one purpose of the proposed amendment was to require meaningful integration of women into the nation's military forces. Amendment supporters were vocal in their insistence that exclusion of women from military service was inconsistent with full equality. Moreover, the amendment was opposed by many precisely on the ground that it would subject women to military service; indeed, Senator Ervin, an opponent, proposed that the ERA "shall not impair . . . the validity of any laws . . . which exempts women from compulsory military service." See, 118 Congr. Rec. 9317, 9331 (1972). The executive department shared the view that the ERA required a gender-neutral draft. On May 7,1971, for example, then Assistant Attorney General Rehnquist, the author of the Roetker opinion, stated his understanding that the ERA would require a gender-neutral draft. Equal Rights for Men and Women: Hearings on H.R.T. Res. 35, 208 and Related Bills before Subcommittee No. 4 of the House Committee on the Judiciary, 92nd Cong., 1st Sess. 327, 328 (1971) (memorandum of William H. Rehnquist, Assistant Attorney General). See also the letter from the Defense Department to Senator Bayh dated Feb. 24, 1972, 118 Congr. Rec. 9344, 9347 (1972). Finally, the Senate Reports accompanying the amendment makes plain a belief that the ERA requires a gender-neutral draft. S. Rep. No. 92-689, Senate Comm. on the Judiciary, 92nd Congr. 2nd Session (1972). "It seems likely . . . that the ERA will require Congress to treat men and women equally with respect to the draft." Id. at 13; see also id. at 24 (statement by Mr. Fong); id. at 36-39 (statement by Mr. Ervin).

This history seems to me to make plain that under the ERA women could not be exempted from the draft. This is a widely shared view. See, for example, Brown, et al., The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871, 969-79 (1971). Hale and Kanowitz, Women and the Draft: A Response to Critics of the Equal Rights Amendment, 123 Hastings L. J. 199, 199-201 (1971); Note, The Equal Rights Amendment and the Military, 82 Yale L.J. 1533, 1537 (1973).

My only hesitation derives from the fact that the current draft seems designed solely to obtain combat troops. In Roetker no constitutional challenge was made to the exclusion of women from combat assignments, and the Court apparently believed that this exclusion is valid. The precise impact of ERA on the combat question is somewhat uncertain. If the ERA does not bar complete exclusion of women from combat, perhaps the current exclusion of women from the draft mights once again be justified. While this line of argument is not wholly implausible, I do not think it is persuasive. It is inconsistent with the ERA's clear legislative history on the subject, and the fact (stressed by the dissenting judges in Roetker) that military needs far exceed that of simply securing combat troops. Moreover, the argument rests on what is to my mind an erroneous initial premise, namely that the ERA would permit wholesale exclusion of women from all combat assignments. The legislative history I have referred to does not support that view.

In sum, I think that the ERA would have been interpreted to require gender-neutral draft registration, and any new ERA will have a similar effect.

Sincerely,

Henry Paul Monaghan
Professor of Law

HPM/klp

REPORT OF THE SUBCOMMITTEE ON MANPOWER AND PERSONNEL ON THE REJECTION OF LEGISLATION REQUIRING THE REGISTRATION OF YOUNG WOMEN UNDER THE MILITARY SELECTIVE SERVICE ACT

The Subcommittee rejected a proposal to require the registration of young women under the Military Selective Service Act.

Mindful of the Congress' constitutional duty under Article I, section 8, "to raise and support Armies," to "provide and maintain a Navy," and "to make Rules for the Government and Regulation of the land and naval Forces," the committee has carefully analyzed deficiencies in our mobilization capabilities. The Committee has expressed its serious concern over manpower problems that are so severe that the Military Services are not now capable of meeting our national security requirements in terms of manpower in the event of mobilization. Peacetime registration will solve some, but not all, of these problems.

In 1979 the Committee reported a bill (S. 109) mandating peacetime registration of males. President Carter, in his State of the Union Address in January 1980, recognized the need for registration to improve our defense posture. The issue of whether women should be registered became a dominant part of this discussion, confusing the real military issues. The Subcommittee on Manpower and Personnel held several additional hearings in 1980 on the registration plan presented by the President, on the question of including women in the plan, and on the military issues involved in registration and conscription. The Committee remains convinced that registration is vitally necessary and that women should not be included in any registration and induction system. This judgment is based upon the Committee's assessment of the military needs of the nation, and its comprehensive study of the registration issue. It is also based on the Committee's assessment of the societal impact of the registration and possible induction of women.

In the Committee's view, the starting point for any discussion of the appropriateness of registering women for the draft is the question of the proper role of women in combat. The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people. It is universally supported by military leaders who have testified before the Committee, and forms the linchpin for any analysis of this problem. History gives examples of women who fought alone and with men during past periods of strife. Women have defended themselves against attack and have been inadvertently drawn into combat activities in defense of their country. Although such examples exist, throughout history women have not regularly participated in combat and no country has ever relied on conscription of women primarily for combat roles. Current law and policy exclude women from being assigned to combat in our military forces, and the Committee reaffirms this policy. The policy precluding the use of women in combat is, in the Committee's view, the most important reason for not including women in a registration system.

Registering women for assignment to combat or assigning women to combat positions in peacetime then would leave the actual performance of sexually mixed units as an experiment to be conducted in war with unknown risk—a risk that the Committee finds militarily unwarranted and dangerous. Moreover, the Committee feels that any attempt to assign women to combat positions could affect the national resolve at the time of mobilization, a time of great strain on all aspects of the Nation's resources.

Women now volunteer for military service and are assigned to most military specialties. These volunteers now make an important contribution to our Armed Forces. The number of women in the military has increased significantly in the past few years and is expected to continue to increase. Only 6 percent of the enlisted skills in the Army are closed to women as a result of the exclusion of women from combat. But these include infantry specialists, armor specialists, combat engineers and positions in field artillery and air defense.

It is in these skills, and more specifically in the very large number of positions needed to be filled in infantry and armor skills, where mobilization manpower is so severely short. It is also these skills that are most difficult to recruit for during peacetime. The Personnel Chiefs of the Army and Marine Corps, for example, testified that it is in these combat skills where the All-Volunteer Force has failed to supply sufficient recruits, and where current strengths of combat units is often woefully inadequate. In peacetime, although only 6 percent of Army enlisted skills are closed to women, fully 48 percent of all billets filled by enlisted personnel in the Army are in specialties, skills or units not available to women. These include noncombat positions in close support units that would come under enemy fire.

All the Military Services testified at length about their mobilization plans and the place of women in those plans. Both the civilian and military leadership agreed that there was no military need to draft women. Because of the combat restrictions, the need would be primarily for men, and women volunteers would fill the requirements for women. The argument for registration and induction of women, therefore, is not based on military necessity, but on considerations of equity. The Army and the Marine Corps testified that because of present shortages in combat arms and the nature of the emergency situation envisaged, the primary need is for combat replacements from the induction system. Selective Service plans provide for drafting only men during the first 60 days, and only a small number of women would be included in the total drafted for the first 180 days.

In addition, there are other military reasons that preclude very large numbers of women serving. Military flexibility requires that a commander be able to move units or ships quickly. Units or ships not located at the front or not previously scheduled for the front nevertheless must be able to move into action if necessary. In peace and war, significant rotation of personnel is necessary. We should not divide the military into two groups—one in permanent combat and one in permanent support. Large numbers of noncombat positions must be available to which combat troops can return for duty before being redeployed.

It is also clear that an induction system that provided half men and half women to the training commands in the event of mobilization would be administratively unworkable and militarily disastrous. It has been suggested that all women be registered, but only a handful actually be inducted in an emergency. The Committee finds this a confused and ultimately unsatisfactory solution.

First, the President's proposal does not include any change in section 5(a)(1) of the Military Selective Service Act, which requires that the draft be conducted impartially among those eligible. Administration witnesses admitted that the current language of the law probably precludes induction men and women on any but a random basis, which should produce roughly equal numbers of men and women. Second, it is conceivable that the courts, faced with a Congressional decision to register men and women equally because of equity considerations, will find insufficient justification for them inducting only a token number of women into the Services in an emergency. Indeed, it is hard to see how the equity which is the aim of advocates of an equal registration system is achieved by a system under which a vastly larger number of men than women would actually be called to duty. If the Congress were to mandate equal registration of men and women, therefore, we might well be faced with a situation in which the combat replacements needed in the first 60 days—say 100,000 men—would have to be accompanied by 100,000 women. Faced with this hypothetical, the military witnesses stated that such a situation would be intolerable. It would create monumental strains on the training system, would clog the personnel administration and support systems needlessly, and would impede our defense preparations at a time of great national need.

Other administrative problems such as housing and different treatment with regard to dependency, hardship and physical standards would also exist.

Finally, the Committee finds that there are important societal reasons for not changing our present male-only system of registration and induction. The question of who should be required to fight for the Nation and how best to accomplish that end is a social issue of the highest order, with sweeping implications for our society.

In addition to the military reasons, which the Committee finds compelling, witnesses representing a variety of groups testified before the Subcommittee that drafting women would place unprecedented strains on family life, whether in peacetime or in time of emergency. If such a draft occurred at a time of emergency, unpredictable reactions to the fact of female conscription would result. A decision which would result in a young mother being drafted and a young father remaining home with the family in a time of national emergency cannot be taken lightly, nor its broader implications ignored. The Committee is strongly of the view that such a result, which would occur if women were registered and inducted under the Administration plan, is unwise and unacceptable to a large majority of our people.

In concluding that a registration and induction system involving only male citizens is the best course to ensure the country's preparedness and its ultimate ability to protect itself, the Committee was mindful of arguments made by some critics of registration that the Constitution requires both men and women to be treated equally. The argument rests on an interpretation of the principle of equal protection that would mandate an equal sharing among men and women of the burden of registration and conscription. The Committee has carefully considered constitutional arguments raised in detailed statements from opponents of a male-only registration and induction system.

In the Committee's view, the arguments for treating men and women equally—so compelling in many areas of our national life—simply cannot overcome the judgment of our military leaders and of the Congress itself that a male-only system best serves our national security. The Supreme Court's most recent teachings in the field of equal protection cannot be read in isolation from its opinions giving great deference to the judgment of Congress and military commanders in dealing the management of military forces and the requirements of military discipline. The Court has made it unmistakably clear that even our most fundamental constitutional rights must in some circumstances be modified in the light of military needs, and that Congress's judgment as to what is necessary to preserve our national security is entitled to great deference.

The Committee took note of an opinion by the Justice Department analyzing the legal issues and concluding that male-only registration is constitutionally defensible. In addition, the Committee's own General Counsel, the Congressional Research Service and several independent legal scholars furnished the Committee with opinions supporting the constitutionality of male-only registration. These documents, along with the opposing views, are reprinted in the Committee's hearings on this matter.

Therefore, while taking seriously the constitutional arguments raised by opponents of a male-only system, the Committee concludes that there is no constitutional impediment to the exclusion of women from registration and induction, and based on the following specific findings rejects the proposal to register women. Further, for the reasons outlined above, the Committee concludes that peacetime registration of men is necessary.

SPECIFIC FINDINGS

(1) Article I, section 8 of the Constitution commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for government and regulation of the land and naval forces, and pursuant to these powers it lies within the discretion of the Congress to determine the occasions for expansion of our armed forces, and the means best suited to such expansion should it prove necessary.

(2) An ability to mobilize rapidly is essential to the preservation of our national security.

(3) A functioning registration system is a vital part of any mobilization plan.

(4) Women make an important contribution to our national defense, and are volunteering in increasing numbers for our armed services.

(5) Women should not be intentionally or routinely placed in combat positions in our military services.

(6) There is no established military need to include women in a selective service system.

(7) Present manpower deficiencies under the All-Volunteer Force are concentrated in the combat arms—infantry, armor, combat engineers, field artillery and air defense.

(8) If mobilization were to be ordered in a wartime scenario, the primary manpower need would be for combat replacements.

(9) The need to rotate personnel and the possibility that close support units could come under enemy fire also limits the use of women in non-combat jobs.

(10) If the law required women to be drafted in equal numbers with men, mobilization would be severely impaired because of strains on training facilities and administrative systems.

(11) Under the Administration's proposal there is no proposal for exemption of mothers of young children. The Administration has given insufficient attention to necessary changes in Selective Service rules, such as those governing the induction of young mothers, and to the strains on family life that would result from the registration and possible induction of women.

(12) A registration and induction system which excludes women is constitutional.

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[From the Washington Times, June 2, 1983]

Women in the Army—I

(By Dan Cragg)

According to the Army, things have never been better for women in the service. But according to some Army women—professional soldiers, not Private Benjamins—this is no time for sergeants, not if they're females.

As of March 31st, 1983, a total of 9.8 percent of the active Army was composed of women, 76,176 officers and enlisted personnel. This is the highest total of women in the active Army since 1945, when it was 153,644. In a widely circulated policy letter of September 1981, Secretary of the Army John O. Marsh, Jr., strongly re-emphasized the Army's commitment to equal opportunity.

"We must continue the implementation of Affirmative Action Plans which provide for the best use of human resources without restrictions based on race, color, or religion, national origin or gender." In the service, such simple and unequivocal statements are known as "The Word," in this case the "good Word."

By fiscal year 1987, the Army expects to have a total of 18,000 female NCOs and 13,000 officers serving in 83 percent of its military occupational specialties (MOS), or about 300 Army jobs. All the evidence thus far indicates that the Army is and has been for some time far ahead of the rest of society in providing minorities and women the benefits of equal opportunity.

So then why are some of the Army's professionals upset with its policy toward women today?

The controversy is over the Army's "combat exclusion policy," which has closed a number of jobs Army-wide and positions in specific units to female soldiers because they carry the inherent possibility of "direct combat" in fluid wartime situations. This does not mean women are upset because they cannot serve in the infantry, nor does it mean that in wartime women will not serve in combat areas.

What it means is that the Army does not want women in jobs that carry a "high probability" of "direct physical contact" with the enemy and a "substantial risk of capture."

"Readiness is not a factor in this," an Army spokesman told me. "To say women impede readiness is a slight to women and the Army. The sense of the American public, expressed through the Congress is that women shouldn't be in direct combat."

Title 10 of the U.S. Code clearly prohibits the use of Air Force and Navy women from service in aircraft or vessels engaged in combat missions, but it is silent on the employment of Army women. Section 3012 of the Code merely affirms the Secretary of the Army's authority to determine the assignment policies of soldiers. This is because land warfare is very fluid, involves vast numbers of personnel, and extends over huge territory so its not possible to define the role of every soldier at any given time in a battle situation.

What this means to the employment of female soldiers is rather complicated. For instance, a woman may not perform duty as an interior electrician because that specialty calls for laying and clearing of minefields and emplacing demolitions and clearing beaches in war. This also applies to such jobs as plumbers and carpentry and masonry specialists.

On the other hand, a woman may perform military police duties, but she cannot be assigned to MP security compaines in the rear because they have the mission of engaging small units of the enemy in direct combat, as was graphically demonstrated in Saigon during Tet 1968. But a female MP may perform duties at Army corps or division level in a combat theater.

Currently 61 jobs are closed to enlisted women as well as an estimated 70,000-80,000 positions in units which normally perform missions in the brigade and other forward battlefield areas, including communications, medical and supply units.

All jobs in the infantry, armor, cannon field artillery, combat engineers and low-altitude air defense artillery units of battalion or squadron size or smaller, have been closed to women for years. These fields comprise 38 job specialties. Following its combat-exclusion policy, in January of this year the Army announced that it was closing 23 more specialties to enlisted women including those seemingly rear-echelon jobs mentioned earlier.

The 1,200 active duty women now in the 23 closed specialties will be reclassified into other fields. The Army is doing all it can to soften the blow by providing individual job counseling and retraining for the women affected. This policy also applies to women in the Army National Guard and the Army Reserve.

But here's the rub. Until now, these hundreds of women have performed well in their jobs. They lack neither the physical or mental competence, nor the courage to perform the duties for which the Army has spent large sums to train them. They are out because The Word has come down. For some it means the end to years of hard work and struggle and it smells strongly of coddling.

Not all Army women are upset over the combat-exclusion policy. Some, perhaps, feel more comfortable in the so-called "traditional" jobs. Yet those who think the policy unfair are not by any means feminist ideologues; they're just working women who want their jobs back.

The Army would be wise to restore the status quo ante bellum. I am dreadfully afeared that while trying to cure a problem that doesn't exist, the Army might wind up shooting itself in the foot instead.

One senior NCO in the Ohio National Guard told me, "I busted my back to get where I am now. I have the respect and confidence of my peers. I feel like someone has kicked me in the guts." She is submitting her complaint through channels, the proper course for a good soldier.

Last April, General John A. Wickam, Jr. who will soon be sworn in as Army Chief of Staff, promised a defense women's group that the list of units closed to women would be reviewed, to see if any could be kept open. Good news for good soldiers everywhere.

As for that Ohio guardswoman, who is still out on a limb, I would remind her of an old Army adage: "In the beginning was the Word, and it was changed."

[From the Washington Times, June 3, 1983]

WOMEN IN THE ARMY—II

(By Dan Cragg)

The trouble with women in the Army is not women, it's men. I can't speak with much authority for the other services, but I suspect that's as true for the Navy and Air Force as it for the dear old Army. The reason is not that women are particularly unsuited for Army life or that Army men don't like women. The simple truth is, military men just don't know what to do with females in their profession.

When I discuss this with my military colleagues (and I've got lots of them) the conversation usually boils down to one basic statement: Army life would be so much *simpler* if there were no women around to complicate things. Then there's a pause and inevitably someone says, "But we've got 'em and we'll have to learn to live with 'em." For soldiers, that's The Word, like it or not.

Today there are more than 76,000 women in the active Army, 9.8 percent of the force, the highest it's been since World War II. But with feminists urging a unisex Army on the one hand and traditionalists barely suppressing their contempt for feminist on the other, this whole issue is clouded with emotion.

But there are two basic facts we should keep in mind always. First, those who believe women should have a chance to show what they can do aren't necessarily feminists. And those who believe there are physical differences between the sexes that makes unisexing unworkable in some circumstances aren't necessarily male chauvinists. I think reasonable people can hold both views simultaneously without being declared hopelessly insane.

And no responsible person wants to put women into the infantry or any other branch of the Army that engages in close combat with the enemy. Most of those who do have never been there themselves. Only young men have the endurance required for foot-slogging in war. In the infantry you carry 60 pounds of gear in 100-degree heat and humidity through country so rugged that at sunset you've only made 5 kilometers since dawn and then you're up all night because the enemy harasses you. Repeat for about 30 days running and then you'll know what the dogfaces and Marines put up with in Vietnam. Those boonies were no place for young women, much less any man over 25.

The law does not specifically prohibit the use of Army women in combat, as it does Navy and Air Force women. It merely affirms the Secretary of the Army's authority to determine soldiers' assignments as he sees fit. But the Army believes that the will of the people, expressed through the law, is that they don't want women killed or captured in close combat with an enemy. So Army officials have come up with a "combat exclusion policy" which closes certain jobs Army-wide and certain positions in units that are deployed to forward areas where there is a "high probability" of close combat with an enemy.

Some of the jobs are support-type, such as light construction and equipment maintenance work that require exposure in forward combat areas. Between 70,000–80,000 positions that require duty in the brigade area are now closed to females. These closed duty positions include medical, communications and transportation units that normally have missions involved in direct support of brigades, although women may still perform duties in these specialties in garrison or other environments above brigade level.

An Army spokesman told me that unit readiness has nothing to do with this. I think it should have everything to do with it. For example, if women can drive the ammo trucks up to where the troops are, let them; if not, don't. And there's no evidence that the Army's willing to make public that they can do it.

Basing an assignment policy on an interpretation of the law is precarious. The Army admits that in wartime some of its women most certainly would become casualties. There's no sure protection against enemy commando attacks or long-range weapons. Remembering Saigon during Tet 1968, if the Viet Cong death squads had really wanted Gen. Westmoreland's headquarters, they could have had it, men, women and mamasans.

Plenty of Army women are upset by all of this and trouble may be brewing.

So far the American Civil Liberties Union has stayed out of the action, which is probably best for everyone. The ACLU believes that a "direct assault on the combat exclusion would fail at this time with the current Supreme Court" and that any suit would be a "fact intensive" case—it would cost them too much in time and money for the results, which would be "too limited to be easily applied to other situations." Apparently professional soldiers do not come under the aegis of our legal watchdogs.

Mind this: Contrary to what some feminists say, we do not have the "right" to die for our country; we have the right to life. Neither is service to country a right—it's a duty. The Army needs neither Congress nor the ACLU to remind it of that.

One final thing. Not too many years ago we had young men running away from America to avoid serving in her Armed Forces. Now a generation of young men is growing up and, egged on by adults who should know better, some refuse even to register for the draft in case someday we may need them to protect our freedoms. Our women patriots put these young fellows to shame. We men should be proud to soldier with such women.

Army women—and those in the other services, too—have a sense of duty that shines as a beacon to rally the young people of this country. Woe to all of us if that light ever goes out.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 80-251

Bernard Rostker, Director of Selective Service, Appellant, *v.* Robert L. Goldberg et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[June 25, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented is whether the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.*, violates the Fifth Amendment to the United States Constitution in authorizing the President to require the registration of males and not females.

I

Congress is given the power under the Constitution "To raise and support Armies," "To provide and maintain a Navy," and "To make Rules for the Government and Regulation of the land and naval Forces." Art. I, § 8, cls. 12–14. Pursuant to this grant of authority Congress has enacted the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.* ("the MSSA" or "the Act"). Section 3 of the Act, 50 U. S. C. App. § 453, empowers the President, by proclamation, to require the registration of "every male citizen" and male resident aliens between the ages of 18 and 26. The purpose of this registration is to facilitate any eventual conscription: pursuant to § 4 (a) of the Act, 50 U. S. C. App. § 454 (a), those persons required to register under § 3 are liable for training and service in the Armed Forces. The MSSA registration provision serves no other purpose beyond providing a pool for subsequent induction.

Registration for the draft under § 3 was discontinued in 1975. Presidential Proclamation No. 4360, 11 Weekly Comp. of Pres. Doc. 318 (April 7, 1975). In early 1980, President Carter determined that it was necessary to reactivate the draft registration process.[1] The immediate impetus for this decision was the Soviet armed invasion of Afghanistan. 16 Weekly Comp. of Pres. Doc. 198 (Jan. 23, 1980) (State of the Union Address). According to the Administration's witnesses before the Senate Armed Services Committee, the resulting crisis in Southwestern Asia convinced the President that the "time has come" "to use his present authority to require registration . . . as a necessary step to preserving or enhancing our national security interests." Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 before the Senate Committee on Armed Services, 96th Cong., 2d Sess., 1805 (1980) (hereafter Hearings on S. 2294) (joint statement of Dr. John P. White, Deputy Director, Office of Management and Budget, Dr. Bernard Rostker, Director, Selective Service System, and Richard Danzig, Principal Deputy Assistant Secretary of Defense). The Selective Service System had been inactive, however, and funds were needed before reactivating registration. The President therefore recommended that funds be transferred from the Department of Defense to the separate Selective Service System. H. R. Doc. No. 96-267, 96th Cong., 2d Sess., 2 (1980). He also recommended that Congress take action to amend the MSSA to permit the registration and conscription of women as well as men. See Presidential Recommendations for Selective Service Reform—A Report to Congress Prepared Pursuant to Pub. L. 96-107 (Feb. 11, 1980), J. A. 57-61.

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[1] The President did not seek conscription. Since the Act was amended to preclude conscription as of July 1, 1973, Pub. L. 92-129, 85 Stat. 353, 50 U. S. C. App. § 467 (c), any actual conscription would require further congressional action. See S. Rep. No. 96-826, 96th Cong., 2d Sess., 155 (1980).

Congress agreed that it was necessary to reactivate the registration process, and allocated funds for that purpose in a joint resolution which passed the House on April 22 and the Senate on June 12. H. R. J. Res. 521, Pub. L. 96–282, 94 Stat. 552. The resolution did not allocate all the funds originally requested by the President, but only those necessary to register males. See S. Rep. No. 96–789, 96th Cong., 2d Sess., 1, n. 1; 2 (1980); 126 Cong. Rec. S6546 (Sen. Nunn) (June 10, 1980). Although Congress considered the question at great length, see *infra,* at 13–16, it declined to amend the MSSA to permit the registration of women.

On July 2, 1980, the President, by proclamation, ordered the registration of specified groups of young men pursuant to the authority conferred by § 3 of the Act. Registration was to commence on July 21, 1980. Proclamation No. 4771, 45 Fed. Reg. 45247.

These events of last year breathed new life into a lawsuit which had been essentially dormant in the lower courts for nearly a decade. It began in 1971 when several men subject to registration for the draft and subsequent induction into the Armed Services filed a complaint in the United States District Court for the Eastern District of Pennsylvania challenging the MSSA on several grounds.[2] A three-judge district court was convened in 1974 to consider the claim of unlawful gender-based discrimination which is now before us.[3] On July 1, 1974, the court declined to dismiss the case as moot, reasoning that although authority to induct registrants had lapsed, see n. 1 *supra*, plaintiffs were still under certain affirmative obligations in connection with registration. 378 F. Supp. 766. Nothing more happened in the case for five years. Then, on June 6, 1979, the court clerk, acting pursuant to a local rule governing inactive cases, proposed that the case be dismissed. Additional discovery thereupon ensued, and defendants moved to dismiss on various justiciability grounds. The court denied the motion to dismiss, ruling that it did not have before it an adequate record on the operation of the Selective Service System and what action would be necessary to reactivate it. Civ. Action No. 71-1480 (Feb. 19, 1980). On July 1, 1980, the court certified a plaintiff class of "all male persons who are registered or subject to registration under 50 U. S. C. App. § 453 or are liable for training and service in the armed forces of the United States under 50 U. S. C. App. § 454, 456 (h) and 467 (c)." 509 F. Supp., at 589.[4]

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[2] Plaintiffs contended that the Act amounted to a taking of property without due process, imposed involuntary servitude, violated rights of free expression and assembly, was unlawfully implemented to advance an unconstitutional war, and impermissibly discriminated between males and females. The District Court denied plaintiffs' application to convene a three-judge district court and dismissed the suit, *Rowland* v. *Tarr,* 341 F. Supp. 339 (ED Pa. 1972). On appeal, the Court of Appeals for the Third Circuit affirmed the dismissal of all claims except the discrimination claim, and remanded the case to the District Court to determine if this claim was substantial enough to warrant the convening of a three-judge court under then-applicable 28 U. S. C. § 2282 (1970 ed.) and whether plaintiffs had standing to assert that claim. 480 F. 2d 545 (1973). On remand, the District Court answered both questions in the affirmative, resulting in the convening of the three-judge court which decided the

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case below. The Act authorizing three-judge courts to hear claims such as this was repealed in 1976, Pub. L. 94-381, §§ 1 and 2, 90 Stat. 1119 (Aug. 12, 1976), but remains applicable to suits filed before repeal, *id.*, § 7, 90 Stat. 1120.

[3] As the Court stated in *Schlesinger* v. *Ballard*, 419 U. S. 498, 500, n. 3 (1975), "Although it contains no Equal Protection Clause as does the Fourteenth Amendment, the Fifth Amendment's Due Process Clause prohibits the federal government from engaging in discrimination that is so unjustifiable as to be violative of due process.' *Bolling* v. *Sharpe*, 347 U. S. 497, 499."

[4] When entering its judgment on July 18, the District Court redefined the class to include "All male persons who are registered under 50 U. S. C. App. § 453 or are liable for training and service in the armed forces of the United States under 50 U. S. C. App. §§ 454, 456 (h) and 467 (c); and who are also either subject to registration under Presidential Proclamation No. 4771 (July 2, 1980) or are presently registered with the Selective Service System." 509 F. Supp., at 605.

On Friday, July 18, 1980, three days before registration was to commence, the District Court issued an opinion finding that the Act violated the Due Process Clause of the Fifth Amendment and permanently enjoined the Government from requiring registration under the Act. The court initially determined that the plaintiffs had standing and that the case was ripe, determinations which are not challenged here by the Government. Turning to the merits, the court rejected plaintiffs' suggestions that the equal protection claim should be tested under "strict scrutiny," and also rejected defendants' argument that the deference due Congress in the area of military affairs required application of the traditional "minimum scrutiny" test. Applying the "important government interest" test articulated in *Craig* v. *Boren*, 429 U. S. 190 (1976), the court struck down the MSSA. The court stressed that it was not deciding whether or to what extent women should serve in combat, but only the issue of registration, and felt that this "should dispel any concern that we are injecting ourselves in an inappropriate manner in military affairs." 509 F. Supp., at 597. See also *id.*, at 599, nn. 17 and 18. The court then proceeded to examine the testimony and hearing evidence presented to Congress by representatives of the military and the Executive Branch, and concluded on the basis of this testimony that "military opinion, backed by extensive study, is that the availability of women registrants would materially increase flexibility, not hamper it." *Id.*, at 603. It rejected Congress' contrary determination in part because of what it viewed as Congress' "inconsistent positions" in declining to register women yet spending funds to recruit them and expand their opportunities in the military. *Id.*, at 603.

The United States immediately filed a notice of appeal and the next day, Saturday, July 19, 1980, JUSTICE BRENNAN, acting in his capacity as Circuit Justice for the Third Circuit, stayed the District Court's order enjoining commencement of registration. —— U. S. ——. Registration began the next

Monday. On December 1, 1980, we noted probable jurisdiction. — U. S. —.

II

Whenever called upon to judge the constitutionality of an Act of Congress—"the gravest and most delicate duty that this Court is called upon to perform," *Blodgett* v. *Holden*, 275 U. S. 142, 148 (1927) (Holmes, J.)—the Court accords "great weight to the decisions of Congress." *CBS, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 102 (1973). The Congress is a coequal branch of government whose members take the same oath we do to uphold the Constitution of the United States. As Justice Frankfurter noted in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 164 (1951) (concurring opinion), we must have "due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality. See, *e. g.*, S. Rep. No. 96-826, 96th Cong., 2d Sess., 159-161 (1980); 126 Cong. Rec. S6531-S6533 (Sen. Warner) (June 10, 1980), S6547 (Sen. Hatfield) (June 10, 1980).

This is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference. In rejecting the registration of women, Congress explicitly relied upon its constitutional powers under Art. I, § 8, cls. 12-14. The "specific findings" section of the Report of the Senate Armed Services Committee, later adopted by both Houses of Congress, began by stating:

> "Article I, section 8 of the Constitution commits ex-

> clusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for Government and regulation of the land and naval forces, and pursuant to these powers it lies within the discretion of the Congress to determine the occasions for expansion of our Armed Forces, and the means best suited to such expansion should it prove necessary." S. Rep. No. 96–826, *supra,* at 160.

See also S. Rep. No. 96–226, 96th Cong., 1st Sess., 8 (1979). This Court has consistently recognized Congress' "broad constitutional power" to raise and regulate armies and navies, *Schlesinger* v. *Ballard,* 419 U. S. 498, 510 (1975). As the Court noted in considering a challenge to the selective service laws, "The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States* v. *O'Brien,* 391 U. S. 367, 377 (1968). See *Lichter* v. *United States,* 334 U. S. 742, 755 (1948).

Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked. In *Gilligan* v. *Morgan,* 413 U. S. 1, 10 (1973), the Court noted:

> "It is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive branches."

See also *Orloff* v. *Willoughby,* 345 U. S. 83, 93–94 (1953).[5]

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[5] See also *Simmons* v. *United States,* 406 F. 2d 456, 459 (CA5), cert. denied, 395 U. S. 982 (1969) ("That the court is not competent or empowered to sit as a super-executive authority to review the decisions of the Executive and Legislative branches of government in regard to the neces-

The operation of a healthy deference to legislative and executive judgments in the area of military affairs is evident in several recent decisions of this Court. In *Parker* v. *Levy*, 417 U. S. 733, 756 (1974), the Court rejected both vagueness and overbreadth challenges to army regulations, noting that "Congress is permitted to legislate both with greater breadth and with greater flexibility" when the statute governs military society, and that "[w]hile the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections." In *Middendorf* v. *Henry*, 425 U. S. 25 (1976), the Court noted that in considering due process claims in the context of summary court martial it "must give particular deference to the determination of Congress, made under its military authority to regulate the land and naval forces. U. S. Const., Art. I, § 8," concerning what rights were available. *Id.*, at 43. See also *id.*, at 49–50 (POWELL, J., concurring). Deference to the judgment of other branches in the area of military affairs also played a major role in *Greer* v. *Spock*, 424 U. S. 828, 837–838 (1976), where the Court upheld a ban on political speeches by civilians on a military base, and *Brown* v. *Glines*, 444 U. S. 348 (1980), where the Court upheld regulations imposing a prior restraint on the right to petition of military personnel. See also *Burns* v. *Wilson*, 346 U. S. 137 (1953); *United States* v. *MacIntosh*, 283 U. S. 605, 622 (1931).

In *Schlesinger* v. *Ballard*, 419 U. S. 498 (1975), the Court considered a due process challenge, brought by males, to the navy policy of according females a longer period than males in which to attain promotions necessary to continued service. The Court distinguished previous gender-based dis-

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sity, method of selection, and composition of our defense forces is obvious and needs no further discussion").

criminations held unlawful in *Reed* v. *Reed*, 404 U. S. 71 (1971) and *Frontiero* v. *Richardson*, 411 U. S. 677 (1973). In those cases, the classifications were based on "overbroad generalizations." See 419 U. S., at 506–507. In the case before it, however, the Court noted:

> "the different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service. Appellee has not challenged the current restrictions on women officers' participation in combat and in most sea duty." *Id.*, at 508.

In light of the combat restrictions, women did not have the same opportunities for promotion as men, and therefore it was not unconstitutional for Congress to distinguish between them.

None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area as any other Congress remains subject to the limitations of the Due Process Clause, see *Ex parte Milligan*, 4 Wall. 2 (1866); *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 156 (1919), but the tests and limitations to be applied may differ because of the military context. We of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice. See *CBS, Inc.* v. *Democratic National Committee*, 412 U. S., at 103. In deciding the question before us we must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.

The District Court purported to recognize the appropriateness of deference to Congress when that body was exercising its constitutionally delegated authority over military affairs, 509 F. Supp., at 596, but it stressed that "[w]e are not here concerned with military operations or day-to-day conduct of the military into which we have no desire to intrude." *Ibid.* Appellees also stress that this case involves civilians, not the military, and that "the impact of registration on the military is only indirect and attenuated." Brief for Appellees 19. We find these efforts to divorce registration from the military and national defense context, with all the deference called for in that context, singularly unpersuasive. *United States* v. *O'Brien*, *supra*, recognized the broad deference due Congress in the selective service area before us in this case. Registration is not an end in itself in the civilian world but rather the first step in the induction process into the military one, and Congress specifically linked its consideration of registration to induction, see, *e. g.*, S. Rep. No. 96–826, *supra*, at 156, 160. Congressional judgments concerning registration and the draft are based on judgments concerning military operations and needs, see, *e. g.*, *id.*, at 157 ("the starting point for any discussion of the appropriateness of registering women for the draft is the question of the proper role of women in combat"), and the deference unquestionably due the latter judgments is necessarily required in assessing the former as well. Although the District Court stressed that it was not intruding on military questions, its opinion was based on assessments of military need and flexibility in a time of mobilization. See, *e. g.*, 509 F. Supp., at 600–605. It would be blinking reality to say that our precedents requiring deference to Congress in military affairs are not implicated by the present case.[6]

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[6] Congress recognized that its decision on registration involved judgments on military needs and operations, and that its decisions were entitled to particular deference. "The Supreme Court's most recent teachings in the field of equal protection cannot be read in isolation from its opinions giving great deference to the judgment of Congress and military

The Solicitor General argues, largely on the basis of the foregoing cases emphasizing the deference due Congress in the area of military affairs and national security, that this Court should scrutinize the MSSA only to determine if the distinction drawn between men and women bears a rational relation to some legitimate government purpose, see *United States Railroad Retirement Board* v. *Fritz*, — U. S. — (1980), and should not examine the Act under the heightened scrutiny with which we have approached gender-based discrimination, see *Michael M.* v. *Superior Court of Sonoma County*, — U. S. — (1981); *Craig* v. *Boren, supra; Reed* v. *Reed, supra.*[7] We do not think that the substantive guarantee of due process or certainty in the law will be advanced by any further "refinement" in the applicable tests as suggested by the Government. Announced degrees of "deference" to legislative judgments, just as levels of "scrutiny" which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result. In this case the courts are called upon to decide whether Congress, acting under an explicit constitutional grant of authority, has by that action transgressed an explicit guarantee of indi-

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commanders in dealing with the management of military forces and the requirements of military discipline. The Court has made it unmistakably clear that even our most fundamental constitutional rights must in some circumstances be modified in the light of military needs, and that Congress' judgment as to what is necessary to preserve our national security is entitled to great deference." S. Rep. No. 96-826, *supra*, at 159-160.

Deference to Congress' judgment was a consistent and dominant theme in lower court decisions assessing the present claim. See, *e. g., United States* v. *Clinton*, 310 F. Supp. 333, 335 (ED La. 1970); *United States* v. *Offord*, 373 F. Supp. 1117, 1118 (ED Wis. 1974).

[7] It is clear that "[g]ender has never been rejected as an impermissible classification in all instances." *Kahn* v. *Shevin*, 416 U. S. 351, 356, n. 10 (1974). In making this observation the Court noted that "Congress has not so far drafted women into the Armed Services, 50 U. S. C. App. § 454." *Ibid.*

vidual rights which limits the authority so conferred. Simply labelling the legislative decision "military" on the one hand or "gender-based" on the other does not automatically guide a court to the correct constitutional result.

No one could deny that under the test of *Craig* v. *Boren*, *supra*, the Government's interest in raising and supporting armies is an "important governmental interest." Congress and its committees carefully considered and debated two alternative means of furthering that interest: the first was to register only males for potential conscription, and the other was to register both sexes. Congress chose the former alternative. When that decision is challenged on equal protection grounds, the question a court must decide is not which alternative it would have chosen, had it been the primary decisionmaker, but whether that chosen by Congress denies equal protection of the laws.

Nor can it be denied that the imposing number of cases from this Court previously cited suggest that judicial deference to such congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged. As previously noted, *ante*, at 9, deference does not mean abdication. The reconciliation between the deference due Congress and our own constitutional responsibility is perhaps best instanced in *Schlesinger* v. *Ballard*, 419 U. S., at 510, where we stated:

> "This Court has recognized that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' *U. S. ex rel. Toth* v. *Quarles*, 350 U. S. 11, 17. See also *Orloff* v. *Willoughby*, 345 U. S. 83, 94 (1953). The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress, see U. S. Const., Art. I, § 8, cls. 12–14, and with the President. See U. S. Const., Art. II, § 2, cl. 1. We cannot say that, in ex-

> ercising its broad constitutional power here, Congress has violated the Due Process Clause of the Fifth Amendment."

Or, as put a generation ago in a case not involving any claim of gender-based discrimination:

> "[J]udges are not given the task of running the Army. The responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Orloff* v. *Willoughby*, 345 U. S., at 93–94.

Schlesinger v. *Ballard* did not purport to apply a different equal protection test because of the military context, but did stress the deference due congressional choices among alternatives in exercising the congressional authority to raise and support armies and make rules for their governance. In light of the floor debate and the report of the Senate Armed Services Committee hereinafter discussed, it is apparent that Congress was fully aware not merely of the many facts and figures presented to it by witnesses who testified before its committees, but of the current thinking as to the place of women in the Armed Services. In such a case, we cannot ignore Congress' broad authority conferred by the Constitution to raise and support armies when we are urged to declare unconstitutional its studied choice of one alternative in preference to another for furthering that goal.

III

This case is quite different from several of the gender-based discrimination cases we have considered in that, despite appeles' assertions. Congress did not act "unthinkingly" or eflexively and not for any considered reason." Brief for ppellees 35. The question of registering women for the raft not only received considerable national attention and as the subject of wide-ranging public debate, but also was xtensively considered by Congress in hearings, floor debate, nd in committee. Hearings held by both Houses of Conress in response to the President's request for authorization register women adduced extensive testimony and evidence oncerning the issue. See Hearings on S. 2294; Hearings on ational Service Legislation before the Subcommittee on ilitary Personnel of the House Committee on Armed Serves, 96th Cong., 2d Sess. (1980) (hereafter House Hearings). hese hearings built on other hearings held the previous ear addressed to the same question.[8]

The House declined to provide for the registration of omen when it passed the Joint Resolution allocating funds r the Selective Service System. See 126 Cong. Rec. H2728–2729, H2747 (April 22, 1980). When the Senate considred the Joint Resolution, it defeated, after extensive debate, n amendment which in effect would have authorized the gistration of women. 126 Cong. Rec. S6527–S6549 (June 0, 1980).[9] As noted earlier, Congress in H. R. J. Res. 521 nly authorized funds sufficient to cover the registration of ales. The Report of the Senate Committee on Appropriaions on H. R. J. Res. 521 noted that the amount authorized as below the President's request "due to the Committee's

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[8] See Reinstitution of Procedures for Registration Under the Military elective Service Act: Hearing on S. 109 and S. 226 before the Subommittee on Manpower & Personnel of the Senate Committee on Armed ervices, 96th Cong., 1st Sess. (1979). Seven months before the President's ll for the registration of women, the Senate Armed Services Committee ejected the idea, see S. Rep. No. 96–226, 96th Cong., 1st Sess., 8–9 (1979).

[9] The amendment provided that no funds "shall be made available for nplementing a system of registration which does not include women." 26 Cong. Rec. S6527.

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decision not to provide $8,500,000 to register women." and that "The amount recommended by the Committee would allow for registration of young men only." S. Rep. No. 96–789, *supra*, at 21; see 126 Cong. Rec. S6546 (Sen. Nunn) (June 10, 1980).

While proposals to register women were being rejected in the course of transferring funds to register males, committees in both Houses which had conducted hearings on the issue were also rejecting the registration of women. The House Subcommittee on Military Personnel of the House Armed Services Committee tabled a bill which would have amended the MSSA to authorize registration of women, H. R. 6569, on March 6, 1980. Legislative Calendar, House Committee on Armed Services, 96th Cong., 2d Sess., 54 (Sept. 30, 1980). The Senate Armed Services Committee rejected a proposal to register women, S. 2440, as it had one year before, see S. Rep. No. 96–226, *supra*, at 8–9, and adopted specific findings supporting its action. See S. Rep. No. 96–826, *supra*, at 156–161. These findings were stressed in debate in the Senate on Joint Resolution 521, see 126 Cong. Rec. S6544–S6545 (Sen. Nunn) (June 10, 1980); S6531–S6532 (Sen. Warner) (June 10, 1980). They were later specifically endorsed by House and Senate conferees considering the Fiscal Year 1981 Defense Authorization Bill. See S. Conf. Rep. No. 96–895, 96th Cong., 2d Sess., 100 (1980).[10] Later both Houses adopted the findings by passing the Report. 126 Cong. Rec. H7800, S11646 (Aug. 26, 1980). The Senate Report, therefore, is considerably more significant than a typical report of a single House, and its findings are in effect findings of the entire Congress.

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[10] The findings were before the conferees because the Senate Armed Services Committee had added a provision to the 1981 Defense Authorization Bill authorizing the transfer of funds to register young men as a stop-gap measure should Joint Resolution 521 fail. See S. Rep. No. 96–895, *supra*, at 100.

The foregoing clearly establishes that the decision to exempt women from registration was not the "accidental byproduct of a traditional way of thinking about women." *Califano* v. *Webster*, 430 U. S. 313, 320 (1977) (quoting *Califano* v. *Goldfarb*, 430 U. S. 199, 233 (1977) (STEVENS, J., concurring)). In *Michael M.*, *supra*, at —, n. 6 (plurality), we rejected a similar argument because of action by the California Legislature considering and rejecting proposals to make a statute challenged on discrimination grounds gender-neutral. The cause for rejecting the argument is considerably stronger here. The issue was considered at great length, and Congress clearly expressed its purpose and intent. Contrast *Califano* v. *Westcott*, 443 U. S. 76, 87 (1979) ("The gender qualification . . . escaped virtually unnoticed in the hearings and floor debate").[11]

For the same reasons we reject appellees' argument that we must consider the constitutionality of the MSSA solely on the basis of the views expressed by Congress in 1948, when the MSSA was first enacted in its modern form. Contrary to the suggestions of appellees and various *amici*, reliance on the legislative history of Joint Resolution 521 and the activity of the various committees of the 96th Congress considering the registration of women does not violate sound principles that appropriations legislation should not be considered as modifying substantive legislation. Congress did not change the MSSA in 1980, but it did thoroughly reconsider the question of exempting women from its provisions, and its basis for doing so. The 1980 legislative history is, therefore, highly relevant in assessing the constitutional validity of the exemption.

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[11] Nor can we agree with the characterization of the MSSA in the Brief for Amicus Curiae National Organization of Women as a law which "coerce[s] or preclude[s] women as a class from performing tasks or jobs of which they are capable," or the suggestion that this case involves "[t]he exclusion of women from the military." *Id.*, at 19–20. Nothing in the MSSA restricts in any way the opportunities for women to volunteer for military service.

The MSSA established a plan for maintaining "adequate armed strength . . . to ensure the security of [the] nation." 50 U. S. C. App. § 451 (b). Registration is the first step "in a united and continuous process designed to raise an army speedily and efficiently," *Falbo* v. *United States*, 320 U. S. 549, 553 (1944), see *United States* v. *Nugent*, 346 U. S. 1, 9 (1953), and Congress provided for the reactivation of registration in order to "provide the means for the early delivery of inductees in an emergency." S. Rep. No. 96-826, *supra*, at 156. Although the three-judge District Court often tried to sever its consideration of registration from the particulars of induction, see, *e. g.*, 509 F. Supp., at 604-605, Congress rather clearly linked the need for renewed registration with its views on the character of a subsequent draft. The Senate Report specifically found that "An ability to mobilize rapidly is essential to the preservation of our national security. A functioning registration system is a vital part of any mobilization plan." S. Rep. No. 96-826, *supra*, at 160. As Senator Warner put it, "I equate registration with the draft." Hearings on S. 2294, *supra*, at 1197. See also *id.*, at 1195 (Sen. Jepsen), 1671 (Sen. Exon). Such an approach is certainly logical, since under the MSSA induction is interlocked with registration: only those registered may be drafted, and registration serves no purpose beyond providing a pool for the draft. Any assessment of the congressional purpose and its chosen means must therefore consider the registration scheme as a prelude to a draft in a time of national emergency. Any other approach would not be testing the Act in light of the purposes Congress sought to achieve.

Congress determined that any future draft, which would be facilitated by the registration scheme, would be characterized by a need for combat troops. The Senate Report explained, in a specific finding later adopted by both Houses, that "if mobilization were to be ordered in a wartime scenario, the primary manpower need would be for combat replacements." S. Rep. No. 96–826, *supra*, at 160; see *id.*, at 158. This conclusion echoed one made a year before by the same Senate Committee, see S. Rep. No. 96–226, *supra*, at 2–3, 6. As Senator Jepsen put it, "The shortage would be in the combat arms. That is why you have drafts." Hearings on S. 2294, *supra*, at 1688. See also *id.*, at 1195 (Sen. Jepsen); 126 Cong. Rec. H2750 (Rep. Nelson) (April 22, 1980). Congress' determination that the need would be for combat troops if a draft took place was sufficiently supported by testimony adduced at the hearings so that the courts are not free to make their own judgment on the question. See Hearings on S. 2294, *supra*, at 1528–1529 (Marine Corps Lt. Gen. Bronars); 1395 (Principal Deputy Assistant Secretary of Army Clark); 1391 (Gen. Yerks); 748 (Gen. Meyer); House Hearings, *supra*, J. A., at 224 (Assistant Secretary of Defense for Manpower Pirie). See also Hearing on S. 109 and S. 226, *supra*, at 24, 54 (Gen. Rogers). The purpose of registration, therefore, was to prepare for a draft *of combat troops*.

Women as a group, however, unlike men as a group, are not eligible for combat. The restrictions on the participation of women in combat in the Navy and Air Force are statutory. Under 10 U. S. C. § 6015 "women may not be assigned to duty on vessels or in aircraft that are engaged in combat missions," and under 10 U. S. C. § 8549 female members of the Air Force "may not be assigned to duty in aircraft engaged in combat missions." The Army and Marine Corps preclude the use of women in combat as a matter of established policy. See J. A. 86, 34, 58. Congress specifically recognized and endorsed the exclusion of women from combat in exempting women from registration. In the words of the Senate Report:

> "The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys

> wide support among our people. It is universally supported by military leaders who have testified before the Committee. . . . Current law and policy exclude women from being assigned to combat in our military forces, and the Committee reaffirms this policy." S. Rep. No. 96-826, *supra,* at 157.

The Senate Report specifically found that "Women should not be intentionally or routinely placed in combat positions in our military services." *Id.,* at 160. See S. Rep. No. 96-226, *supra,* at 9.[12] The President expressed his intent to continue the current military policy precluding women from combat, see Presidential Recommendations for Selective Service Reform, *supra,* J. A. 34, and appellees present their argument concerning registration against the background of such restrictions on the use of women in combat.[13] Consistent with the approach of this Court in *Schlesinger* v. *Ballard, supra,* we must examine appellees' constitutional claim concerning registration with these combat restrictions firmly in mind.

The existence of the combat restrictions clearly indicates the basis for Congress' decision to exempt women from registration. The purpose of registration was to prepare for a draft of combat troops. Since women are excluded from combat, Congress concluded that they would not be needed in the event of a draft, and therefore decided not to register them. Again turning to the Senate Report:

> "In the Committee's view, the starting point for any discussion of the appropriateness of registering women for the draft is the question of the proper role of women

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[12] No major country has women in combat jobs in their standing army. See J. A. 143.

[13] See Brief for Appellees 1-2, n. 2 (denying any concession of the validity of combat restrictions, but submitting restrictions are irrelevant to the present case). See also J. A. 256.

> in combat. . . . The policy precluding the use of women in combat is, in the Committee's view, the most important reason for not including women in a registration system." S. Rep. No. 96-826, *supra*, at 157.[14]

The District Court stressed that the military need for women was irrelevant to the issue of their registration. As that court put it: "Congress could not constitutionally require registration under MSSA of only black citizens or only white citizens, or single out any political or religious group simply because those groups contained sufficient persons to fill the needs of the Selective Service System." 509 F. Supp., at 596. This reasoning is beside the point. The reason women are exempt from registration is not because military needs can be met by drafting men. This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic registration. Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft.

Congress' decision to authorize the registration of only men, therefore, does not violate the Due Process Clause. The exemption of women from registration is not only sufficiently but closely related to Congress' purpose in authorizing registration. See *Michael M., supra, at* —— (plurality); *Craig*

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[14] JUSTICE MARSHALL's suggestion that since Congress focused on the need for combat troops in authorizing male-only registration the Court could "be forced to declare the male-only registration program unconstitutional," *post*, at 11, in the event of a peacetime draft misreads our opinion. The perceived need for combat or combat-eligible troops in the event of a draft was not limited to a wartime draft. See, *e. g.*, S. Rep. No. 96-826, *supra*, at 157 (considering problems associated with "[r]egistering women for assignment to combat *or assigning women to combat positions in peacetime*") (emphasis supplied); *id.*, at 158 (need for rotation between combat and non-combat positions "[i]n peace and war").

v. *Boren, supra; Reed* v. *Reed, supra.* The fact that Congress and the Executive have decided that women should not serve in combat fully justifies Congress in not authorizing their registration, since the purpose of registration is to develop a pool of potential combat troops. As was the case in *Schlesinger* v. *Ballard, supra,* "the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated" in this case. *Michael M., supra,* at —- (plurality). The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality.

In holding the MSSA constitutionally invalid the District Court relied heavily on the President's decision to seek authority to register women and the testimony of members of the Executive Branch and the military in support of that decision. See, *e. g.,* 509 F. Supp., at 603–604, and n. 30. As stated by the Administration's witnesses before Congress, however, the President's "decision to ask for authority to register women is based on equity." House Hearings, J. A. 217 (statement of Assistant Secretary of Defense Pirie and Director of Selective Service System Rostker); see also Presidential Recommendations for Selective Service Reform, *supra,* J. A. 35, 59, 60; Hearings on S. 2294, *supra,* at 1657 (statement of Executive Associate Director of Office of Management and Budget Wellford, Director of Selective Service System Rostker, and Principal Deputy Assistant Secretary of Defense Danzig). This was also the basis for the testimony by military officials. Hearings on S. 2294, at 710 (Gen. Meyer), 1002 (Gen. Allen). The Senate Report, evaluating the testimony before the Committee, recognized that "the argument for registration and induction of women . . . is not based on military necessity, but on considerations of equity." S. Rep. No. 96–826, *supra,* at 158. Congress was certainly entitled, in the exercise of its constitutional powers to raise and regulate armies and navies, to focus on the question of military need rather than "equity."[15] As Senator Nunn of the Senate Armed Services Committee put it:

> "Our Committee went into very great detail. We found that there was no military necessity cited by any witnesses for the registration of females.
>
> "The main point that those who favored the registration of females made was that they were in favor of this because of the equality issue which is, of course, a legitimate view. But as far as military necessity, and that is what we are primarily, I hope, considering in the overall registration bill, there is no military necessity for this." 126 Cong. Rec. S6544.

See also House Hearings, *supra*, J. A. 230 (Rep. Holt) ("You are talking about equity. I am talking about military.").[16]

Although the military experts who testified in favor of registering women uniformly opposed the actual drafting of women, see, *e. g.*, Hearing on S. 109 and S. 226, *supra*, at 11 (Gen. Rogers), there was testimony that in the event of a draft of 650,000 the military could absorb some 80,000 female inductees. Hearings on S. 2294, *supra*, at 1661, 1828. The 80,000 would be used to fill noncombat positions, freeing men to go to the front. In relying on this testimony in striking down the MSSA, the District Court palpably exceeded its authority when it ignored Congress' considered response to this line of reasoning.

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[15] The grant of constitutional authority is, after all, to Congress and not to the Executive or military officials.

[16] The District Court also focused on what it termed Congress' "inconsistent positions" in encouraging women to volunteer for military service and expanding their opportunities in the service, on the one hand, and exempting them from registration and the draft on the other. 509 F. Supp., at 603-604. This reasoning fails to appreciate the different purposes served by encouraging women volunteers and registration for the draft. Women volunteers do not occupy combat positions, so encouraging women to volunteer is not related to concerns about the availability of combat troops. In the event of a draft, however, the need would be for combat troops or troops which could be rotated into combat. See 17-18, *supra*. Congress' positions are clearly not inconsistent and in treating them as such the District Court failed to understand Congress' purpose behind registration as distinguished from its purpose in encouring women volunteers.

In the first place, assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans. "It has been suggested that all women be registered, but only a handful actually be inducted in an emergency. The Committee finds this a confused and ultimately unsatisfactory solution." S. Rep. No. 96–826, *supra,* at 158. As the Senate Committee recognized a year before, "training would be needlessly burdened by women recruits who could not be used in combat." S. Rep. No. 96–226, *supra,* at 9. See also S. Rep. No. 96–826, *supra,* at 159 ("Other administrative problems such as housing and different treatment with regard to dependency, hardship and physical standards would also exist."). It is not for this Court to dismiss such problems as insignificant in the context of military preparedness and the exigencies of a future mobilization.

Congress also concluded that whatever the need for women for noncombat roles during mobilization, whether 80,000 or less, it could be met by volunteers. See S. Rep. No. 96–826, *supra,* at 160; *id.,* at 158 ("Because of the combat restrictions, the need would be primarily for men, and women volunteers would fill the requirements for women."); House Hearings, *supra,* J. A. 227–228 (Rep. Holt). See also Hearings on S. 2294, *supra,* at 1195 (Gen. Rogers).

Most significantly, Congress determined that staffing noncombat positions with women during a mobilization would be positively detrimental to the important goal of military flexibility.

> "There are other military reasons that preclude very large numbers of women from serving. Military flexi-

> bility requires that a commander be able to move units or ships quickly. Units or ships not located at the front or not previously scheduled for the front nevertheless must be able to move into action if necessary. In peace and war, significant rotation of personnel is necessary. We should not divide the military into two groups—one in permanent combat and one in permanent support. Large numbers of non-combat positions must be available to which combat troops can return for duty before being redeployed." S. Rep. No. 96-826, *supra*, at 158.

The point was repeated in specific findings, *id.*, at 160; see also S. Rep. No. 96-226, *supra*, at 9. In sum, Congress carefully evaluated the testimony that 80,000 women conscripts could be usefully employed in the event of a draft and rejected it in the permissible exercise of its constitutional responsibility. See also Hearing on S. 109 and S. 226, *supra*, at 16 (Gen. Rogers);[17] Hearings on S. 2294, *supra*, at 1682. The District Court was quite wrong in undertaking an independent evaluation of this evidence, rather than adopting an appropriately deferential examination of *Congress'* evaluation of that evidence.

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[17] General Rogers' testimony merits quotation:

"General ROGERS. One thing which is often lost sight of, Senator, is that in an emergency during war, the Army has often had to reach back into the support base, into the supporting elements in the operating base, and pull forward soldiers to fill the ranks in an emergency; that is, to hand them a rifle or give them a tanker suit and put them in the front ranks.

"Senator WARNER. General Patton did that at one time, I believe at the Battle of the Bulge.

"General ROGERS. Absolutely.

"Now, if that support base and that operating base to the rear consists in large measure of women, then we don't have that opportunity to reach back and pull them forward, because women should not be placed in a forward fighting position or in a tank, in my opinion. So that, too, enters the equation when one considers the subject of the utility of women under contingency conditions."

In light of the foregoing, we conclude that Congress acted well within its constitutional authority when it authorized the registration of men, and not women, under the Military Selective Service Act. The decision of the District Court holding otherwise is accordingly

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 80-251

Bernard Rostker, Director of Selective Service, Appellant, *v.* Robert L. Goldberg et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[June 25, 1981]

Justice White, with whom **Justice Brennan** joins, dissenting.

I assume what has not been challenged in this case—that excluding women from combat positions does not offend the Constitution. Granting that, it is self-evident that if during mobilization for war, all noncombat military positions must be filled by combat-qualified personnel available to be moved into combat positions, there would be no occasion whatsoever to have any women in the Army, whether as volunteers or inductees. The Court appears to say, *ante*, pp. 18–19, that Congress concluded as much and that we should accept that judgment even though the serious view of the Executive Branch, including the responsible military services, is to the contrary. The Court's position in this regard is most unpersuasive. I perceive little, if any, indication that Congress itself concluded that every position in the military, no matter how far removed from combat, must be filled with combat-ready men. Common sense and experience in recent wars, where women volunteers were employed in substantial numbers, belie this view of reality. It should not be ascribed to Congress, particularly in the face of the testimony of military authorities, hereafter referred to, that there would be a substantial number of positions in the services that could be filled by women both in peacetime and during mobilization, even though they are ineligible for combat.

I would also have little difficulty agreeing to a reversal if all the women who could serve in wartime without adversely affecting combat readiness could predictably be obtained through volunteers. In that event, the equal protection component of the Fifth Amendment would not require the United States to go through, and a large segment of the population to be burdened with, the expensive and essentially useless procedure of registering women. But again I cannot agree with the Court, see *ante*, p. 23, that Congress concluded or that the legislative record indicates that each of the services could rely on women volunteers to fill all the positions for which they might be eligible in the event of mobilization. On the contrary, the record as I understand it, supports the District Court's finding that the services would have to conscript at least 80,000 persons to fill positions for which combat-ready men would not be required. The consistent position of the Defense Department representatives was that their best estimate of the number of women draftees who could be used productively by the Services in the event of a major mobilization would be approximately 80,000 over the first six months. See Hearings on S. 2294: Hearings before the Committee on Armed Services, 96th Cong., Sess. (1980), 1681, 1688; Hearing on H. R. 6569: Hearings before the Military Personnel Subcommittee of the House Committee on Armed Services, 96th Cong., 2d Sess. (1980), J. A., at 222–223. This number took into account the estimated number of women volunteers, see Deposition of Director of Selective Service Bernard Rostker, at 8; Deposition of Principal Deputy Asst. Secretary of Defense Richard Danzig, J. A., at 276. Except for a single, unsupported, and ambiguous statement in the Senate Report to the effect that "women volunteers would fill the requirements for women," there is no indication that Congress rejected the Defense Department's figures or relied upon an alternative set of figures.

Of course, the division among us indicates that the record in this respect means different things to different people, and

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I would be content to vacate the judgment below and remand for further hearings and findings on this crucial issue. Absent that, however, I cannot agree that the record supports the view that all positions for which women would be eligible in war time could and would be filled by female volunteers.

The Court also submits that because the primary purpose of registration and conscription is to supply combat troops and because the great majority of noncombat positions must be filled by combat-trained men ready to be rotated into combat, the absolute number of positions for which women would be eligible is so small as to be *de minimus* and of no moment for equal protection purposes, especially in light of the administrative burdens involved in registering all women of suitable age. There is some sense to this; but at least on the record before us, the number of women who could be used in the military without sacrificing combat-readiness is not at all small or insubstantial, and administrative convenience has not been sufficient justification for the kind of outright gender-based discrimination involved in registering and conscripting men but no women at all.

As I understand the record, then, in order to secure the personnel it needs during mobilization, the Government cannot rely on volunteers and must register and draft not only to fill combat positions and those noncombat positions that must be filled by combat-trained men, but also to secure the personnel needed for jobs that can be performed by persons ineligible for combat without diminishing military effectiveness. The claim is that in providing for the latter category of positions, Congress is free to register and draft only men. I discern no adequate justification for this kind of discrimination between men and women. Accordingly, with all due respect, I dissent.

SUPREME COURT OF THE UNITED STATES

No. 80-251

Bernard Rostker, Director of Selective Service, Appellant, *v.* Robert L. Goldberg et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[June 25, 1981]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The Court today places its imprimatur on one of the most potent remaining public expressions of "ancient canards about the proper role of women," *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542, 545 (1971) (MARSHALL, J., concurring). It upholds a statute that requires males but not females to register for the draft, and which thereby categorically excludes women from a fundamental civic obligation. Because I believe the Court's decision is inconsistent with the Constitution's guarantee of equal protection of the laws, I dissent.

I

A

The background to this litigation is set out in the opinion of the Court, *ante*, at 1–6, and I will not repeat that discussion here. It bears emphasis, however, that the only question presented by this case is whether the exclusion of women from registration under the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.*, (MSSA) contravenes the equal protection component of the Due Process Clause of the Fifth Amendment. Although the purpose of registration is to assist preparations for drafting civilians into the military, *we are not asked to rule on the constitutionality of a statute governing conscription.*[1] With the advent of the All-Volunteer

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[1] Given the Court's lengthy discourse on the background to this litiga-

Armed Forces, the MSSA was specifically amended to preclude conscription as of July 1, 1973. Pub. L. 92–129, § 101 (35), 85 Stat. 353, 50 U. S. C. App. § 467 (c), and reactivation of the draft would therefore require a legislative amendment. See S. Rep. No. 96–826, at 155 (1980). Consequently, we are not called upon to decide whether either men or women can be drafted at all, whether they must be drafted in equal numbers, in what order they should be drafted, or once inducted, how they are to be trained for their respective functions. In addition, this case does not involve a challenge to the statutes or policies that prohibit female members of the Armed Forces from serving in combat.[2] It is with this understanding that I turn to the task at hand.

B

By now it should be clear that statutes like the MSSA, which discriminate on the basis of gender, must be examined under the "heightened" scrutiny mandated by *Craig* v. *Boren,* 429 U. S. 190 (1976).[3] Under this test, a gender-based classification cannot withstand constitutional challenge unless the

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tion, it is interesting that the Court chooses to bury its sole reference to this fact in a footnote. See *ante,* at 2, n. 1.

[2] By statute, female members of the Air Force and the Navy may not be assigned to vessels or aircraft engaged in combat missions. See 10 U. S. C. §§ 6015 and 8549. Although there are no statutory restrictions on the assignment of women to combat in the Army and the Marine Corps, both services have established policies that preclude such assignment.

Appellees do not concede the constitutional validity of these restrictions on women in combat, but they have taken the position that their validity is irrelevant, for purposes of this case.

[3] I join the Court, see *ante,* at 11, in rejecting the Solicitor General's suggestion that the gender-based classification employed by the MSSA should be scrutinized under the "rational relationship" test used in reviewing challenges to certain types of social and economic legislation. See, *e. g.*, *Schweiker* v. *Wilson,* — U. S. — (1981); *United States Railroad Retirement Bd.* v. *Fritz,* — U. S. — (1980).

classification is substantially related to the achievement of an important governmental objective. *Kirchberg* v. *Feenstra*, — U. S. —, — (1981); *Wengler* v. *Druggist Mutual Ins. Co.*, 446 U. S. 142, 150 (1980); *Califano* v. *Westcott*, 443 U. S. 76, 84 (1979); *Orr* v. *Orr*, 440 U. S. 268, 278 (1979); *Craig* v. *Boren*, *supra*, at 197. This test applies whether the classification discriminates against males or females. *Caban* v. *Mohammed*, 441 U. S. 380, 391 (1979); *Orr* v. *Orr*, *supra*, at 278–279; *Craig* v. *Boren*, *supra*, at 204.[4] The party defending the challenged classification carries the burden of demonstrating both the importance of the governmental objective it serves and the substantial relationship between the discriminatory means and the asserted end. See *Wengler* v. *Druggist Mutual Insurance Co.*, *supra*, at 151; *Caban* v. *Mohammed*, *supra*, at 393; *Craig* v. *Boren*, *supra*, at 204. Consequently, before we can sustain the MSSA, the Government must demonstrate that the gender-based classification it employs bears "a close and substantial relationship to [the achievement of] important governmental objectives," *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 273 (1979).

C

The MSSA states that "an adequate armed strength must be achieved and maintained to insure the security of this Nation." 50 U. S. C. App. § 451 (b). I agree with the majority, *ante*, at 12, that "none could deny that . . . the Government's interest in raising and supporting armies is an 'important governmental interest.'" Consequently, the first part of the *Craig* v. *Boren*, test is satisfied. But the question remains whether the discriminatory means employed itself substantially serves the statutory end. In concluding that it does, the Court correctly notes that Congress enacted (and reactivated) the MSSA pursuant to its constitutional authority to raise and maintain armies.[5] The majority also notes, *ante*, at 6, that "the Court accords 'great weight to the decisions of Congress.'" quoting *CBS, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 102 (1973), and that the Court has accorded particular deference to decisions arising in the context of Congress' authority over military affairs. I have no particular quarrel with these sentiments in the majority opinion. I simply add that even in the area of military affairs, deference to congressional judgments cannot be allowed to shade into an abdication of this Court's ultimate responsibility to decide constitutional questions. As the Court has pointed out,

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[4] Consequently, it is of no moment that the constitutional challenge in this case is pressed by men who claim that the MSSA's gender classification discriminates against them.

> "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.'" *United State* v. *Robel*, 389 U. S. 258, 263–264 (1967), quoting *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 426 (1934).

See *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 88–89 (1921); *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 156 (1919); *Ex parte Milligan*, 4 Wall. 2, 121–127 (1866).

One such "safeguar[d] of essential liberties" is the Fifth Amendment's guarantee of equal protection of the laws.[6]

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[5] The Constitution grants Congress the power "To raise and support Armies," "To Provide and maintain a Navy," and "To make Rules for the Government and Regulation of the land and naval Forces." U. S. Const. Art. I, § 8, cls. 12–14.

[6] Although the Fifth Amendment contains no Equal Protection Clause, this Court has held that "the Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is 'so unjustifiable as to be violative of due process.'" *Schlesinger* v. *Ballard*,

When, as here, a federal law that classifies on the basis of gender is challenged as violating this constitutional guarantee, it is ultimately for this Court, not Congress, to decide whether there exists the constitutionally required "close and substantial relationship" between the discriminatory means employed and the asserted governmental objective. See *Powell* v. *McCormack*, 395 U. S. 486, 549 (1969); *Baker* v. *Carr*, 369 U. S. 186, 211 (1962). In my judgment, there simply is no basis for concluding in this case that excluding women from registration is substantially related to the achievement of a concededly important governmental interest in maintaining an effective defense. The Court reaches a contrary conclusion only by using an "[a]nnounced degre[e] of 'deference' to legislative judgmen[t]" as a "facile abstractio[n] . . . to justify a particular result." *Ante*, at 11.

II

A

The Government does not defend the exclusion of women from registration on the ground that preventing women from serving in the military is substantially related to the effectiveness of the Armed Forces. Indeed, the successful experience of women serving in all branches of the Armed Services would belie any such claim. Some 150,000 women volunteers are presently on active service in the military,[7] and their number is expected to increase to over 250,000 by 1985. See

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419 U. S. 498, 500, n. 3 (1975), quoting *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954).

[7] With the repeal in 1967 of a statute limiting the number of female members of the Armed Forces to 2% of total enlisted strength, the number of women in the military has risen steadily both in absolute terms and as a percentage of total active military personnel. The percentage has risen from 0.78% in 1966, to over 5% in 1976, and is expected to rise to 12% by 1985. See United States Department of Defense, Use of Women in the Military (2d ed., 1978), reprinted at J. A. 98, 111–113; M. Binkin & S. Bach, Women and the Military 13–21 (1977).

Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 before the Senate Committee on Armed Services, 96th Cong., 2d Sess., 1657, 1683 (1980) (1980 Senate Hearings); Women in the Military: Hearings before the Military Personnel Subcommittee of the House Committee on Armed Services, 96th Cong., 1st and 2d Sess., 13–23 (1979 and 1980) (Women in the Military Hearings). At the congressional hearings, representatives of both the Department of Defense and the Armed Services testified that the participation of women in the All-Volunteer Armed Forces has contributed substantially to military effectiveness. See, *e. g.*, 1980 Senate Hearings, *supra,* at 1389 (General Yerks), 1682 (Principal Deputy Assistant Secretary of Defense Danzig); Women in the Military Hearings, *supra,* at 13–23 (Assistant Secretary of Defense Pirie). Congress has never disagreed with the judgment of the military experts that women have made significant contributions to the effectiveness of the military. On the contrary, Congress has repeatedly praised the performance of female members of the Armed Forces, and has approved efforts by the Armed Services to expand their role. Just last year, the Senate Armed Services Committee declared:

> "Women now volunteer for military service and are assigned to most military specialties. These volunteers now make an important contribution to our Armed Forces. The number of women in the military has increased significantly in the past few years and is expected to continue to increase." S. Rep. No. 96–826, *supra,* at 157; accord, S. Rep. 96–226, at 8 (1979).[6]

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[6] In summarizing the testimony presented at the congressional hearings, Senator Cohen stated:

"[B]asically the evidence has come before this committee that participation of women in the All-Volunteer Force has worked well, has been praised by every military officer who has testified before the committee, and that the jobs are being performed with the same, if not in some cases, with

These statements thus make clear that Congress' decision to exclude women from registration—and therefore from a draft drawing on the pool of registrants—cannot rest on a supposed need to prevent women from serving in the Armed Forces. The justification for the MSSA's gender-based discrimination must therefore be found in considerations that are peculiar to the objectives of registration.

The most authoritative discussion of Congress' reasons for declining to require registration of women is contained in the report prepared by the Senate Armed Services Committee on the Fiscal Year 1981 Defense Authorization Bill. S. Rep. No. 96–826, *supra,* at 156–161. The Report's findings were endorsed by the House-Senate Conferees on the Authorization Bill. See S. Conf. Rep. No. 96–895, at 100 (1980). Both Houses of Congress subsequently adopted the findings by passing the Conference Report. 126 Cong. Rec. H7800, S11646 (daily ed., Aug. 26, 1980). As the majority notes, *ante,* at 15, the Report's "findings are in effect findings of the entire Congress." The Senate Report sets out the objectives Congress sought to accomplish by excluding women from registration, see *id.,* at 157–161, and this Court may appropriately look to the Report in evaluating the justification for the discrimination.

B

According to the Senate Report, "[t]he policy precluding the use of women in combat is . . . the most important reason for not including women in a registration system." S. Rep. No. 96–826, *supra,* at 157; see also S. Rep. No. 96–226, *supra,* at 9. In reaffirming the combat restrictions, the Report declared:

> "Registering women for assignment to combat or assigning women to combat positions in peacetime then would

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superior skill." Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 before the Senate Committee on Armed Services, 96th Cong., 2d Sess., 1678 (1980) (1980 Senate Hearings).

> leave the actual performance of sexually mixed units as an experiment to be conducted in war with unknown risk—a risk that the committee finds militarily unwarranted and dangerous. Moreover, the committee feels that any attempt to assign women to combat positions could affect the national resolve at the time of mobilization, a time of great strain on all aspects of the Nation's

Had appellees raised a constitutional challenge to the prohibition against assignment of women to combat, this discussion in the Senate Report might well provide persuasive reasons for upholding the restrictions. But the validity of the combat restrictions is not an issue we need decide in this case.[9] Moreover, since the combat restrictions on women have already been accomplished through statutes and policies that remain in force whether or not women are required to register or drafted, including women in registration and draft plans will not result in their being assigned to combat roles. Thus, even assuming that precluding the use of women in combat is an important governmental interest in its own right, there can be no suggestion that the exclusion of women from registration and a draft is substantially related to the achievement of this goal.

The Court's opinion offers a different though related explanation of the relationship between the combat restrictions and Congress' decision not to require registration of women.

> resources." S. Rep. No. 96–826, *supra*, at 157.

The majority states that "Congress . . . clearly linked the need for renewed registration with its views of the character of a subsequent draft." *Ante*, at 17. The Court also states that "Congress determined that any future draft, which would be facilitated by the registration scheme, would be characterized by a need for combat troops." *Ibid.* The Court then reasons that since women are not eligible for assignment to combat, Congress' decision to exclude them from registration is not unconstitutional discrimination inasmuch as "[m]en and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft." *Ante*, at 20. There is a certain logic to this reasoning, but the Court's approach is fundamentally flawed.

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[9] As noted, see n. 2 *supra*, appellees elected not to challenge the constitutionality of the combat restrictions.

In the first place, although the Court purports to apply the *Craig* v. *Boren* test, the "similarly situated" analysis the Court employs is in fact significantly different from the *Craig* v. *Boren* approach. Compare *Kirchberg* v. *Feenstra*, — U. S., at ——–—— (employing *Craig* v. *Boren* test) with *id.*, at —— (STEWART, J., concurring) (employing "similarly situated" analysis). The Court essentially reasons that the gender classification employed by the MSSA is constitutionally permissible because nondiscrimination is not necessary to achieve the purpose of registration to prepare for a draft of combat troops. In other words, the majority concludes that women may be excluded from registration because they will not be needed in the event of a draft.[10]

This analysis, however, focuses on the wrong question. The relevant inquiry under the *Craig* v. *Boren* test is not whether a *gender-neutral* classification would substantially advance important governmental interests. Rather, the question is whether the gender-based classification is itself substantially related to the achievement of the asserted governmental interest. Thus, the Government's task in this case is to demonstrate that excluding women from registration substantially furthers the goal of preparing for a draft of combat troops. Or to put it another way, the Government must show that registering women would substantially impede its efforts to prepare for such a draft. Under our precedents, the Government cannot meet this burden without showing that a gender neutral statute would be a less effective means of attaining this end. See *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U. S., at 151. As the Court explained in *Orr* v. *Orr*, 440 U. S., at 283 (emphasis added):

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[10] I would have thought the logical conclusion from this reasoning is that there is in fact no discrimination against women, in which case one must wonder why the Court feels compelled to pledge its purported fealty to the *Craig* v. *Boren* test.

> "Legislative classifications which distribute benefits and burdens on the basis of gender *carry the inherent risk of reinforcing sexual stereotypes about the 'proper place' of women and their need for special protection.* . . . Where, as here, the [Government's] . . . purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the [Government] cannot be permitted to classify on the basis of sexual stereotypes."

In this case, the Government makes no claim that preparing for a draft of combat troops cannot be accomplished just as effectively by *registering* both men and women but *drafting* only men if only men turn out to be needed.[11] Nor can the Government argue that this alternative entails the additional cost and administrative inconvenience of registering women. This Court has repeatedly stated that the administrative convenience of employing a gender classification is not an adequate constitutional justification under the *Craig* v. *Boren* test. See, *e. g.*, *Craig* v. *Boren*, 429 U. S., at 198; *Frontiero* v. *Richardson*, 411 U. S. 677, 690–691 (1973).

The fact that registering women in no way obstructs the governmental interest in preparing for a draft of combat troops points up a second flaw in the Court's analysis. The Court essentially reduces the question of the constitutionality of male-only *registration* to the validity of a hypothetical program for *conscripting* only men. The Court posits a draft in which *all* conscripts are either assigned to those specific combat posts presently closed to women or must be available for rotation into such positions. By so doing, the Court is able to conclude that registering women would be no more than a "gestur[e] of superficial equality," *ante,* at 21, since women are necessarily ineligible for every position to be filled in its hypothetical draft. If it could indeed be guaranteed in advance that conscription would be reimposed by Congress only in circumstances where, and in a form under which, all conscripts would have to be trained for and assigned to combat or combat rotation positions from which women are categorically excluded, then it could be argued that registration of women would be pointless.

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[11] Alternatively, the Government could employ a classification that is related to the statutory objective but is not based on gender, for example, combat eligibility. Under the current scheme, large subgroups of the male population who are ineligible for combat because of physical handicaps or conscientious objector status are nonetheless required to register.

But of course, no such guarantee is possible. Certainly, nothing about the MSSA limits Congress to reinstituting the draft only in such circumstances. For example, Congress may decide that the All-Volunteer Armed Forces are inadequate to meet the Nation's defense needs even in times of peace and reinstitute peacetime conscription. In that event, the hypothetical draft the Court relied on to sustain the MSSA's gender-based classification would presumably be of little relevance, and the Court could then be forced to declare the male-only registration program unconstitutional. This difficulty comes about because both Congress [12] and the Court have lost sight of the important distinction between *registra-*

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[12] The Court quotes Senator Warner's comment: "'I equate registration with the draft,'" *ante,* at 17. The whole of Senator Warner's statement merits quotation because it explains why Congress refused to acknowledge the distinction between registration and the draft. Senator Warner stated: "Frankly I equate registration with the draft because there is no way you can establish a registration law on a coequal basis and then turn right around and establish a draft on a nonequal basis. I think the court would knock that down right away." 1980 Senate Hearings, *supra,* at 1197.

tion and *conscription.* Registration provides "an inventory of what the available strength is within the military qualified pool in this country." Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearing before the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee, 96th Cong., 1st Sess., 10 (1980) (Selective Service Hearings) (statement of General Rogers). Conscription supplies the military with the personnel needed to respond to a particular exigency. The fact that registration is a first step in the conscription process does not mean that a registration law expressly discriminating between men and women may be justified by a valid conscription program which would, in retrospect, make the current discrimination appear functionally related to the program that emerged.

But even addressing the Court's reasoning on its own terms, its analysis is flawed because the entire argument rests on a premise that is demonstrably false. As noted, the majority simply assumes that registration prepares for a draft in which *every* draftee must be available for assignment to combat. But the majority's draft scenario finds no support in either the testimony before Congress, or more importantly, in the findings of the Senate Report. Indeed, the scenario appears to exist only in the Court's imagination, for even the Government represents only that "in the event of mobilization, *approximately two-thirds* of the demand on the induction system would be for *combat skills.*" Brief for Appellant, at 29 (emphasis added). For my part, rather than join the Court in imagining hypothetical drafts, I prefer to examine the findings in the Senate Report and the testimony presented to Congress.

C

Nothing in the Senate Report supports the Court's intimation that women must be excluded from registration because combat eligibility is a prerequisite for *all* the positions that would need to be filled in the event of a draft. The Senate

Report concluded only that "[i]f mobilization were to be ordered in a wartime scenario, the *primary* manpower need would be for combat replacements." S. Rep. No. 96-826, *supra*, at 160 (emphasis added). This conclusion was in keeping with the testimony presented at the congressional hearings. The Department of Defense indicated that in the event of a mobilization requiring reinstitution of the draft, the primary manpower requirement would be for combat troops and support personnel who can readily be deployed into combat. See 1980 Senate Hearings, *supra*, at 1395 (Principal Deputy Assistant Secretary of the Army Clark), 1390 (General Yerks). But the Department indicated that conscripts would also be needed to staff a variety of support positions having no prerequisite of combat eligibility, and which therefore could be filled by women. Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics) Pirie explained:

> "Not only will we need to expand combat arms, as I say, that is the pressing need, but we also have to expand the support establishment at the same time because that meets the situation where the combat arms can carry out their function successful[ly], and the support establishment now uses women very effectively, and in wartime I think the same will be true." National Service Legislation: Hearing on H. R. 6569 before the Subcommittee on Military Personnel of the House Committee on Armed Services, 96th Cong., 2d Sess. (1980) (unpublished) (1980 House Hearings), J. A. 225.

In testifying about the Defense Department's reasons for concluding that women should be included in registration plans, Pirie stated:

> "It is in the interest of national security that, in an emergency requiring the conscription for military service of the nation's youth, the best qualified people for a wide variety of tasks in our Armed Forces be available.

> The performance of women in our Armed Forces today strongly supports the conclusion that many of the best qualified people for some military jobs in the 18–26 age category will be women." 1980 House Hearings, *supra*, J. A. 218. See 1980 Senate Hearings, *supra*, at 171 (Secretary of the Army Alexander), 182 (Secretary of the Navy Claytor).[13]

The Defense Department also concluded that there are no military reasons that would justify excluding women from registration. The Department's position was described to Congress in these terms:

> "Our conclusion is that there are good reasons for registering [women]. Our conclusion is *even more strongly that there are not good reasons for refusing to register*

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[13] Pirie explained the reasoning behind the Defense Department's conclusion in these terms:

"Large number of military women work in occupations such as electronics, communications, navigation, radar repair, jet engine mechanics, drafting, surveying, ordnance, transportation and meteorology and do so very effectively, as has been shown by numerous DOD studies and tests. The work women in the Armed Forces do today is essential to the readiness and capability of the forces. In case of war that would still be true, and the number of women doing similar work would inevitably expand beyond our peacetime number of one quarter million.

"Women have traditionally held the vast majority of jobs in such fields as administrative/clerical and health care/medical. An advantage of registration for women is that a pool of trained personnel in these traditionally female jobs would exist in the event that sufficient volunteers were not available. It would make far greater sense to include women in a draft call and thereby gain many of these skills than to draft on[l]y males who would not only require training in these fields but would be drafted for employment in jobs traditionally held by females. A further advantage would be to release males currently holding non-combatant jobs for reassignment to combat jobs." National Service Legislation: Hearing on H. R. 6569 before the Subcommittee on Military Personnel of the House Committee on Armed Services, 96th Cong., 2d Sess. (1980) (unpublished) (1980 House Hearings), J. A. 216–217.

> *them.*" 1980 Senate Hearings, *supra,* at 1667–1668 (Principal Deputy Assistant Secretary of Defense Danzig) (emphasis added).

All four Service Chiefs agreed that there are no military reasons for refusing to register women, and uniformly advocated requiring registration of women. The military's position on the issue was summarized by then Army Chief of Staff General Rogers: "[W]omen should be required to register for the reason that [Marine Corps Commandant] General Wilson mentioned, which is in order for us to have an inventory of what the available strength is within the military qualified pool in this country." Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearing before the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee, 96th Cong., 1st Sess., 10 (1980) (Selective Service Hearings); see *id.,* at 10–11 (Admiral Hayward, Chief of Naval Operations; General Allen, Air Force Chief of Staff; General Wilson, Commandant, Marine Corps).

Against this background, the testimony at the congressional hearings focused on projections of manpower needs in the event of an emergency requiring reinstitution of the draft, and, in particular, on the role of women in such a draft. To make the discussion concrete, the testimony examined a draft scenario dealing with personnel requirements during the first six months of mobilization in response to a major war in Europe. The Defense Department indicated three constraints on the maximum number of women the Armed Services could use in the event of such a mobilization:

> "(1) legislative prohibitions against the use of women in certain military positions, (2) the policy to reserve certain assignments, such as ground combat roles, for men only, and (3) the need to reserve a substantial number of non-combat positions for men in order to provide a pool of ready replacements for ground combat posi-

> tions." 1980 House Hearings, *supra*, J. A. 217 (Assistant Secretary Pirie).

After allowing for these constraints, the Defense Department reached the following conclusion about the number of female draftees that could be absorbed:

> "If we had a mobilization, our present best projection is that we could use women in some 80,000 of the jobs that we would be inducting 650,000 people for. The reason for that is because some 80,000 of those jobs, indeed more than 80,000 of those jobs are support related and not combat related.
>
> "We think women could fill those jobs quite well." 1980 Senate Hearings, *supra*, at 1688 (Principal Deputy Assistant Secretary of Defense Danzig); see *id.* 1661, 1665, 1828; 1980 House Hearings, *supra*, J. A. 217, 222–223 (Assistant Secretary of Defense Pirie).[14]

Finally, the Department of Defense acknowledged that amending the MSSA to authorize registration and induction of women did not necessarily mean that women would be drafted in the same numbers as men. Assistant Secretary Pirie explained:

> "If women were subject to the draft, the Department of Defense would determine the maximum number of women that could be used in the Armed Forces, subject to existing constraints and the needs of the Military Services to provide close combat fillers and replacements quickly. We estimate that this might require at least 80,000 additional women over the first six months. If there were not enough women volunteers, a separate draft call for women would be issued." 1980 House Hearings,

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[14] The Defense Department arrived at this number after it "surveyed the military services, and asked them how many women they could use [in the event of a mobilization of] 650,000, and received answers suggesting that they could use about 80,000." 1980 Senate Hearings, *supra*, at 1665 (Principal Deputy Assistant Secretary of Defense Danzig).

supra, J. A. 217; see 1980 Senate Hearings, *supra*, at 1661 (Principal Deputy Assistant Secretary of Defense Danzig).

This review of the findings contained in the Senate Report and the testimony presented at the congressional hearings demonstrates that there is no basis for the Court's representation that women are ineligible for *all* the positions that would need to be filled in the event of a draft. Testimony about personnel requirements in the event of a draft established that women could fill at least 80,000 of the 650,000 positions for which conscripts would be inducted. Thus, with respect to these 80,000 or more positions, the statutes and policies barring women from combat do not provide a reason for distinguishing between male and female potential conscripts; the two groups are, in the majority's parlance, "similarly situated." As such, the combat restrictions cannot by themselves supply the constitutionally required justification for the MSSA's gender-based classification. Since the classification precludes women from being drafted to fill positions for which they would be qualified and useful, the Government must demonstrate that excluding women from those positions is substantially related to the achievement of an important governmental objective.

III

The Government argues, however, that the "consistent testimony before Congress was to the effect that there is *no military need* to draft women." Brief for Appellant, at 31 (emphasis in original). And the Government points to a statement in the Senate Report that "[b]oth the civilian and military leadership agreed that there was no military need to draft women. . . . The argument for registration and induction of women . . . is not based on military necessity, but on considerations of equity." S. Rep. No. 96–826, *supra*, at 158. In accepting the Government's contention, the Court asserts that the President's decision to seek authority to register women was based on "equity," and concludes that "Congress was certainly entitled, in the exercise of its constitutional powers to raise and regulate armies and navies, to focus on the question of military need rather than 'equity.'" *Ante,* at 21-22. In my view, a more careful examination of the concepts of "equity" and "military need" is required.

As previously noted, the Defense Department's recommendation that women be included in registration plans was based on its conclusion that drafting a limited number of women is consistent with, and could contribute to, military effectiveness. See *supra,* at 13-17. It was against this background that the military experts concluded that "equity" favored registration of women. Assistant Secretary Pirie explained:

> "Since women have proven that they can serve successfully as volunteers in the Armed Forces, equity suggests that they be liable to serve as draftees if conscription is reinstated." 1980 House Hearings, *supra,* J. A. 217-218.

By "considerations of equity," the military experts acknowledged that female conscripts can perform as well as male conscripts in certain positions, and that there is therefore no reason why one group should be totally excluded from registration and a draft. Thus, what the majority so blithely dismisses as "equity" is nothing less than the Fifth Amendment's guarantee of equal protection of the laws which "requires that Congress treat similarly situated persons similarly," maj. op., *ante,* at 21. Moreover, whether Congress could subsume this constitutional requirement to "military need," in part depends on precisely what the Senate Report meant by "military need."

The Report stated that "[b]oth the civilian and military leadership agreed that there was no military need to draft women." S. Rep. No. 96-826, *supra,* at 158. An examination of what the "civilian and military leadership" meant by "military need" should therefore provide an insight into the

Report's use of the term. Several witnesses testified that because personnel requirements in the event of a mobilization could be met by drafting men, including women in draft plans is not a military necessity. For example, Assistant Secretary of Defense Pirie stated:

> "It is doubtful that a female draft can be justified on the argument that wartime personnel requirements cannot be met without them. The pool of draft eligible men . . . is sufficiently large to meet projected wartime requirements." 1980 House Hearings, *supra,* J. A. 217; see 1980 Senate Hearings, *supra,* at 1665 (Principal Deputy Assistant Secretary of Defense Danzig).

Similarly, Army Chief of Staff General Meyer testified:

> "I do not believe there is a need to draft women in peacetime. In wartime, because there are such large numbers of young men available, approximately 2 million males in each year group of the draft age population, there would be no military necessity to draft females except, possibly doctors, and other health professionals if there are insufficient volunteers from people with those skills." *Id.,* at 749.

To be sure, there is no "military need" to draft women in the sense that a war could be waged without their participation.[15]

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[15] A colloquy between Senator Jepsen and Principal Deputy Assistant Secretary of Defense Danzig reveals that some Members of Congress understood "military need" in this sense.

"Mr. DANZIG. . . . We surveyed the military services, and asked them how many women they could use among those 650,000, and received answers suggesting that they could use 80,000.

"Let me indicate when I say they could use, I do not mean to imply that they would have to use women. Our Department of Defense view is that women would be useful in a mobilization scenario. If women are not available, I do not think the republic would crumble. Men could be used instead."

"Sen. JEPSEN. So there is no explicit military requirement involved?"

"Mr. DANZIG. My problem, Senator, and I don't mean to be semantic

This fact is, however, irrelevant to resolving the constitutional issue.[16] As previously noted, see *supra*, at 9–10, it is not appellees' burden to prove that registration of women substantially furthers the objectives of the MSSA.[17] Rather, because eligibility for combat is not a requirement for some of the positions to be filled in the event of a draft, it is incumbent on the Government to show that excluding women from a draft to fill those positions substantially furthers an important governmental objective.

It may be, however, that the Senate Report's allusion to "military need" is meant to convey Congress' expectation that women volunteers will make it unnecessary to draft any women. The majority apparently accepts this meaning when it states: "Congress also concluded that whatever the need for women for noncombat roles during mobilization, whether 80,000 or less, it could be met by volunteers." *Ante*, at 23. But since the purpose of registration is to protect against unanticipated shortages of volunteers, it is difficult to see

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about it, is with the use of the words, 'explicit requirement.' If you said to me, for example, does the military require people with brown eyes to serve, I would tell you no, because people with blue eyes, et cetera, could do the job.

"On the other hand, I wouldn't deny that they could do the job and that we would find them useful." 1980 Senate Hearings, *supra*, at 1665; see *id.*, at 1853–1856.

[16] Deputy Assistant Attorney General Simms explained as much to Congress in his testimony at the hearings. He stated:

"[T]he question of military necessity for drafting women is irrelevant to the constitutional issue, which is whether or not there is sufficient justification by whatever test the courts may apply for not registering women." 1980 Senate Hearings, *supra*, at 1667.

[17] If we were to assign appellees this burden, then all of the Court's prior "mid-level" scrutiny equal protection decisions would be drawn into question. For the Court would be announcing a new approach under which the party challenging a gender-based classification has the burden of showing that *elimination* of the classification substantially furthers an important governmental interest.

how excluding women from registration can be justified by conjectures about the expected number of female volunteers.[18] I fail to see why the exclusion of a pool of persons who would be conscripted only *if needed* can be justified by reference to the current supply of volunteers. In any event, the Defense Department's best estimate is that in the event of a mobilization requiring reinstitution of the draft, there will not be enough women volunteers to fill the positions for which women would be eligible. The Department told Congress:

> "If we had a mobilization, our present best projection is that we could use women in some 80,000 of the jobs we would be *inducting* people for." 1980 Senate Hearings, *supra*, at 1688 (Principal Deputy Assistant Secretary of Defense Danzig) (emphasis added).[19]

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[18] As Assistant Secretary of Defense Pirie explained:

"Perhaps sufficient women volunteers would come forward to meet this need, perhaps not. Having our young women register in advance would put us in a position to call women if they do not volunteer in sufficient numbers," quoted at 126 Cong. Rec. S6536–S6537 (daily ed., June 10, 1980). See 1980 Senate Hearings, *supra*, at 1828 (Principal Deputy Assistant Secretary of Defense Danzig).

Past wartime recruitment experience does not bear out the Court's sanguine view. With the advent of the Korean War, an unsuccessful effort was made to recruit some 100,000 women to meet the rapidly expanding manpower requirements. See Use of Women in the Military, *supra*, J. A. 111.

[19] A colloquy between Representative Hillis and Assistant Secretary of Defense Pirie at the House Hearings makes clear that the 80,000 number is in addition to the number of women serving in the All-Volunteer Armed Forces.

"Mr. PIRIE. Mr. Hillis, we estimate that we would need 650,000 individuals to be inducted over the first six months."

"Rep. HILLIS. How many of those would be women?"

"Mr. PIRIE. At least 80,000, Mr. Hillis."

"Rep. HILLIS. That is even if we had the 250,000 [women in active service expected by 1985], you are talking about another 80,000, which projects into about 330,000."

"Mr. PIRIE. Yes, sir." 1980 House Hearings, *supra*, J. A. 232–233.

Thus, however the "military need" statement in the Senate Report is understood, it does not provide the constitutionally required justification for the total exclusion of women from registration and draft plans.

IV

Recognizing the need to go beyond the "military need" argument, the Court asserts that "Congress determined that staffing noncombat positions with women during a mobilization would be positively detrimental to the important goal of military flexibility." *Ante*, at 23. None would deny that preserving "military flexibility" is an important governmental interest. But to justify the exclusion of women from registration and the draft on this ground, there must be a further showing that staffing even a limited number of noncombat positions with women would impede military flexibility. I find nothing in the Senate Report, to provide any basis for the Court's representation that Congress believed this to be the case.

The Senate Report concluded that "military reasons . . . preclude *very large numbers* of women from serving." S. Rep. No. 96–826, *supra*, at 158 (emphasis added). The Report went on to explain:

> "Military flexibility requires that a commander be able to move units or ships quickly. Units or ships not located at the front or not previously scheduled for the front nevertheless must be able to move into action if necessary. In peace and war, significant rotation of personnel is necessary. We should not divide the military into two groups—one in permanent combat and one in permanent support. Large numbers of non-combat positions must be available to which combat troops can return for duty before being redeployed." *Ibid.*

This discussion confirms the Report's conclusion that drafting "*very large numbers* of women" would hinder military flexibility. The discussion does not, however, address the different question whether drafting only a *limited* number of women would similarly impede military flexibility. The testimony on this issue at the congressional hearings was that drafting a limited number of women is quite compatible with the military's need for flexibility. In concluding that the Armed Services could usefully employ at least 80,000 women conscripts out of a total of 650,000 draftees that would be needed in the event of a major European war, the Defense Department took into account both the need for rotation of combat personnel and the possibility that some support personnel might have to be sent into combat. As Assistant Secretary Pirie testified:

> "If women were subject to the draft, the Department of Defense would determine the maximum number of women that could be used in the Armed Forces, *subject to existing constraints and the needs of the Military Services to provide close combat fillers and replacements quickly.* We estimate that this might require at least 80,000 additional women over the first six months." 1980 House Hearings, *supra,* J. A. 217 (emphasis added); see J. A. 278 (deposition of Principal Deputy Assistant Secretary of Defense Danzig).[20]

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[20] Senator Warner questioned the Service Chiefs about the "impact on your service as a consequence of a draft, *which would be based on a total provision of equality between male and female.*" Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearing before the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee, 96th Cong., 1st Sess., 15 (1979) (emphasis added) (Selective Service Hearings). Two of the Service Chiefs answered Senator Warner's question about the effect of a draft of equal numbers of men and women. Their answers merit quotation.

"General ALLEN [Air Force]. It would not have any unfavorable effect on the Air Force. We would have no objection to such a draft." *Id.,* at 15.

"General WILSON [Marine Corps]. [W]e would be perfectly happy

Similarly, there is no reason why induction of a limited number of female draftees should any more divide the military into "permanent combat" and "permanent support" groups than is presently the case with the All-Volunteer Armed Forces. The combat restrictions that would prevent a female draftee from serving in a combat or combat rotation position also apply to the 150,000–250,000 women volunteers in the Armed Services. If the presence of increasing but controlled numbers of female volunteers has not unacceptably "divide[d] the military into two groups," it is difficult to see how the induction of a similarly limited additional number of women could accomplish this result. In these circumstances, I cannot agree with the Court's attempt to "interprete" the Senate Report's conclusion that drafting *very large numbers* of women would impair military flexibility, as proof that Congress reached the entirely different conclusion that drafting a limited number of women would adversely affect military flexibility.

V

The Senate Report itself recognized that the "military flexibility" objective speaks only to the question whether "very large numbers" of women should be drafted. For the Report went on to state:

> "It has been suggested that all women be registered, but only a handful actually be inducted in an emergency. The committee finds this a confused and ultimately unsatisfactory solution." S. Rep. No. 96–826, *supra*, at 158.

The Report found the proposal "confused" and "unsatisfactory" for two reasons.

"First, the President's proposal [to require registration

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to have women drafted. That is up to the 5 percent goal which I believe we can handle in the Marine Corps." *Ibid.*

> of women] does not include any change in section 5 (a) (1) of the [MSSA], which requires that the draft be conducted impartially among those eligible. Administration witnesses admitted that the current language of the law probably precludes induction of women and men on any but a random basis, which should produce roughly equal numbers of men and women. Second, it is conceivable that the courts, faced with a congressional decision to *register* men and women equally because of equity considerations, will find insufficient justification for then *inducting* only a token number of women into the Services in an emergency." *Id.*, at 158–159 (emphasis in original).

The Report thus assumed that if women are registered, any subsequent draft would require simultaneous induction of equal numbers of male and female conscripts. The Report concluded that such a draft would be unacceptable:

> "It would create monumental strains on the training system, would clog the personnel administration and support systems needlessly, and would impede our national defense preparations at a time of great national need.
>
> "Other administrative problems such as housing and different treatment with regard to dependency, hardship and physical standards would also exist." *Id.*, at 159; see also S. Rep. No. 96–226, *supra*, at 9.[21]

Relying on these statements, the majority asserts that even "assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans." *Ante*, at 22. In actual fact, the conclusion the Senate Report reached is significantly different from the one the Court seeks to attribute to it.

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[21] The Report further explained:

"If the Congress were to mandate equal registration of men and women, therefore, we might well be faced with a situation in which the combat replacements needed in the first 60 days—say 100,000 men—would have to be accompanied by 100,000 women. Faced with this hypothetical, the military witnesses stated that such a situation would be intolerable." S. Rep. No. 96–826, at 159 (1980).

The specific finding by the Senate Report was that "[i]f the law required women to be drafted *in equal numbers* with men, mobilization would be severely impaired because of strains on training facilities and administrative systems." S. Rep. No. 96-826, *supra*, at 160 (emphasis added). There was, however, no suggestion at the congressional hearings that simultaneous induction of *equal* numbers of males and female conscripts was either necessary or desirable. The Defense Department recommended that women be included in registration and draft plans, with the number of female draftees and the timing of their induction to be determined by the military's personnel requirements. See *supra*, at 16-17.[22] In endorsing this plan, the Department gave no indication that such a draft would place any strains on training and administrative facilities. Moreover, the Director of the Selective Service System testified that a registration and induction process including both males and females would present no administrative problems. See 1980 Senate Hearings, *supra*, at 1679 (Rostker); J. A. 247-248 (deposition of Bernard Rostker).

The Senate Report simply failed to consider the possibility that a limited number of women could be drafted because of its conclusion that § 5 (a)(1) of the MSSA does not authorize drafting different numbers of men and women and its speculation on judicial reaction to a decision to register women. But since Congress was free to amend § 5 (a)(1), and indeed would have to undertake new legislation to authorize any draft, the matter cannot end there. Furthermore, the Senate Report's speculation that a statute authorizing differential induction of male and female draftees would be vulnerable to constitutional challenge is unfounded. The unchallenged restrictions on the assignment of women to combat, the need to preserve military flexibility, and the other factors discussed in the Senate Report provide more than ample grounds for concluding that the discriminatory means employed by such a statute would be substantially related to the achievement of important governmental objectives. Since Congress could have amended § 5 (a)(1) to authorize differential induction of men and women based on the military's personnel requirements, the Senate Report's discussion about "added burdens" that would result from drafting equal numbers of male and female draftees provides no basis for concluding that the total exclusion of women from registration and draft plans is substantially related to the achievement of important governmental objectives.

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[22] As stated in the Senate Report, "Selective Service Plans provide[d] for drafting only men during the first 60 days, and only a small number of women would be included in the total drafted for the first 180 days." S. Rep. No. 96-826, *supra*, at 158.

In sum, neither the Senate Report itself nor the testimony presented at the congressional hearings provides any support for the conclusion the Court seeks to attribute to the Report—that drafting a limited number of women, with the number and the timing of their induction and training determined by the military's personnel requirements, would burden training and administrative facilities.

VI

After reviewing the discussion and findings contained in the Senate Report, the most I am able to say of the Report is that it demonstrates that drafting *very large numbers* of women would frustrate the achievement of a number of important governmental objectives that relate to the ultimate goal of maintaining "an adequate armed strength . . . to insure the security of this Nation," 50 U. S. C. App. § 451 (b). Or to put it another way, the Senate Report establishes that induction of a large number of men but only a limited number of women, as determined by the military's personnel requirements, would be substantially related to important governmental interests. But the discussion and findings in the Senate Report do not enable the Government to carry its burden of demonstrating that *completely* excluding women from the draft by excluding them from registration substantially furthers important governmental objectives.

In concluding that the Government has carried its burden in this case, the Court adopts "an appropriately deferential examination of *Congress'* evaluation of [the] evidence," *ante,* at 24 (emphasis in the original). The majority then proceeds to supplement Congress' actual findings with those the Court apparently believes Congress could (and should) have made. Beyond that, the Court substitutes hollow shibboleths about "deference to legislative decisions" for constitutional analysis. It is as if the majority has lost sight of the fact that "it is the responsibility of this Court to act as the ultimate interpreter of the Constitution." *Powell* v. *McCormack,* 395 U. S., at 549. See *Baker* v. *Carr,* 369 U. S., at 211. Congressional enactments in the area of military affairs must, like all other laws, be *judged* by the standards of the Constitution. For the Constitution is the supreme law of the land and *all* legislation must conform to the principles it lay down. As the Court has pointed out, "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit." *United States* v. *Robel,* 389 U. S., at 263–264.

Furthermore, "[w]hen it appears that an Act of Congress conflicts with [a constitutional] provisio[n], we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation." *Trop* v. *Dulles,* 356 U. S. 86, 104 (1958) (plurality opinion). In some 106 instances since this Court was established it has determined that congressional action exceeded the bounds of the Constitution. I believe the same is true of this statute. In an attempt to avoid its constitutional obligation, the Court today "pushes back the limits of the Constitution" to accommodate an Act of Congress.

I would affirm the judgment of the District Court.

THE IMPACT OF THE EQUAL RIGHTS AMENDMENT: ABORTION RIGHTS

TUESDAY, JANUARY 24, 1984

U.S. Senate,
Subcommittee on the Constitution,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:34 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Thurmond, Grassley, Metzenbaum, and DeConcini.

Staff present: Stephen Markman, chief counsel; Randall Rader, general counsel; Diane Franke, clerk; and Bob Feidler, ranking minority counsel.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator Hatch. Ladies and gentlemen, this marks the fourth day of hearings by the Subcommittee on the Constitution on the proposed equal rights constitutional amendment.

From the outset, our objective has been to establish a thorough and comprehensive legislative history of the meaning of the text of the amendment. Whatever the ultimate resolution of this issue during the present Congress or during subsequent Congresses, it is the goal of these hearings to ensure that Members of Congress, members of the State legislatures and members of the public are better informed about the real-world impact of the ERA. In other words, what new public policies will emerge from the amendment? What existing policies will have to be reformed or eliminated? How will American society be transformed by the 52 words of the proposed measure?

To this end, we have conducted what I believe have been extensive and highly informative hearings on such issues as the impact of the ERA on private education, the impact of the ERA upon the military, a constitutional overview of the ERA, and so forth.

In this process, we have tried to set aside the cliches and the stock phrases on both sides of the ERA issue. Rather, we have attempted to focus closely on judicial decisions, legal trends, statements of academics, and Members of Congress of varying perspectives, and the text of the ERA itself in attempting to predict the substantive impact of the amendment.

I am confident that the legislative history that has been developed will prove useful through the duration of the debate over the ERA.

Our hearing today will concentrate upon the issue of the ERA's effect upon abortion policy in the United States. Already, this aspect of the equal rights amendment has proven to be one of the most controversial aspects of the debate over the ERA in the House of Representatives.

Clearly, the failure of the ERA to secure two-thirds approval last November in the House was attributable, at least in part, to the decision of the House leadership to preclude from consideration floor amendments to the ERA, including floor amendments relating to the abortion issue.

As at our earlier hearings, we have sharply limited the number of witnesses invited by the subcommittee in order to allow extensive discussion.

Also, as at our earlier hearings, we have afforded both proponents and critics of the ERA the opportunity to invite their most knowledgeable and articulate spokespersons. We are extremely fortunate today to have two of the Nation's leading academic authorities on the equal rights amendment and the right to abortion.

Selected by ERA proponents for today's discussion is Prof. Ann Freedman of the Rutgers University Law School. Professor Freedman is one of the Nation's leading authorities on the equal rights amendment. Her article on the amendment, coauthored with Prof. Thomas Emerson, in the Yale Law Journal of 1971, was incorporated by both Senator Birch Bayh and Congresswoman Martha Griffiths as the authoritative guide to the meaning of the ERA. Regrettably, since the article predated the Supreme Court's 1973 decision in *Roe* v. *Wade*, it made no mention of the abortion controversy.

Selected by ERA critics for today's hearing is Prof. John Noonan of the University of California at Berkeley. Professor Noonan is one of the Nation's leading constitutional authorities and certainly a leading authority on the abortion right. His work, "A Private Choice," is one of the classic works in this area. He is the former editor of the American Journal of Jurisprudence.

We look forward to hearing from both of our outstanding witnesses today and we want to welcome them to our subcommittee. For the record, I would note that our next hearing on the impact of the ERA is presently scheduled for February 21.

At this time, we will turn to the chairman of the committee, Senator Thurmond.

The CHAIRMAN. Mr. Chairman, I have no opening statement.

Senator HATCH. Thank you, Senator Thurmond.

Senator Grassley?

OPENING STATEMENT OF SENATOR CHARLES E. GRASSLEY

Senator GRASSLEY. Well, first of all, Mr. Chairman, I want to thank you for conducting these hearings, a continuation of hearings that started before on these very important questions. And I want to point out to people something that I hope everybody is aware of.

This subcommittee has faced the various issues and questions raised by the proposed equal rights amendment and attempted to answer those questions, and that is in sharp contrast to the conduct of our counterparts in the other body.

Whether the ERA will be used as a legal justification for mandating the States and the Federal Government to finance abortions is a very vital question and one to which the answer to must be known before Members of Congress vote on this measure.

As one who disagrees with the holding of the Supreme Court in *Roe* v. *Wade*, I contend that this question must be resolved.

Again, Mr. Chairman, I thank you for this opportunity and commend you for your efforts.

Senator HATCH. Well, thank you so much, Senator Grassley. I see no other members of the subcommittee here.

Next, I wish to place a statement of Senator Garn in the record.

[The following was received for the record:]

TESTIMONY OF HONORABLE JAKE GARN,
TO THE SUBCOMMITTEE ON THE CONSTITUTION
OF THE UNITED STATES SENATE JUDICIARY COMMITTEE,

Mr. Chairman:

I appreciate the opportunity to speak briefly to this committee on the subject of the Equal Rights Amendment, and particularly to address ERA's potential effect on American abortion law. I believe that ratification of the Equal Rights Amendment will mean the end of the Hyde Amendment. Some of my reasons for this belief are set out below; I will not detail them in these introductory remarks. Additionally, ERA may have other effects on other aspects of abortion law, but I have limited my remarks to ERA's likely effect on abortion funding restrictions.

Before going further, I wish to commend the chairman, my colleague and friend from Utah, for the manner in which he has conducted these hearings. The Senate hearings of this Congress have cast more light on the Equal Rights Amendments than did a decade of political posturing. The chairman deserves the gratitude of the American public. Unfortunately, he has probably received more criticism than praise. I want the chairman to know that this Senator supports his approach to these hearings: Unlike some of the chairman's critics, I think we ought to know what a constitutional amendment means before we approve it. This proposal will produce very concrete results. If its most influential supporters are to be believed, the Equal Rights Amendment will forbid current Congressional policy in the areas of military conscription and assignment, veterans' preference, Social Security, abortion funding, and tax-exempt organizations such as schools--to name but a few of the more controversial areas. The chairman deserves our gratitude for his conscientious performance of his legislative duties.

I am an opponent of the Equal Rights Amendment. One of the reasons I oppose ERA is my conviction that ERA will constitutionally forbid the Hyde Amendment. ERA may create other constitutional hurdles for other anti-abortion measures as well. The evidence for the ERA-abortion connection is overwhelming. I do not need to repeat the evidence for this committee. Congressman Henry Hyde testified before this committee last summer, and you will add today's testimony to his remarks. In the House, we have the testimony of Professor Grover Rees and Professor Jules Gerard.

We also have the testimony of Paige Cunningham of Americans United for Life. Many, many pro-life House Members are convinced of the ERA-abortion connection. These Members are from both sides of the aisle. Congressman James Sensenbrenner and Michael DeWine are to be especially commended for their brilliant inquiry into this matter when ERA was pending before the House Judiciary Committee. All, or nearly all, pro-life political and educational groups are convinced of the ERA-abortion connection. These groups are opposed to ERA unless an abortion-neutral amendment is added. (In the House, the Sensenbrenner Amendment is the abortion-neutral amendment. We know now that the House leadership is afraid of voting on the Sensenbrenner amendment. Perhaps they fear that reason will prevail.) In an important study, Karen Lewis of the American Law Division of the Congressional Research Service has recognized that ERA will require tax-funded abortion. The civil libertarian litigators, especially the affiliates of the American Civil Liberties Union, have recognized the ERA-abortion connection and they have used it in at least four states to argue in support of tax-funded abortion. So far, the state courts have not relied on the state ERAs to defeat Hyde Amendment-like provisions in the states. We have been shown, however, the intentions of those who value abortion as a basic constitutional right, and who think taxpayers ought to pay for this "right."

I hope the subcommittee will have printed in its hearing record the remarkably frank admission of the executive director of the Civil Liberties Union of Massachusetts. (I will be glad to furnish a copy, if necessary.) Said the executive director, "The state Equal Rights Amendment provides a legal argument that was unavailable to us or anyone at the federal level. The national Equal Rights Amendment is in deep trouble. . . . Because a strong coalition is being forged between the anti-ERA coalition and the anti-abortion people, it was our hope to be able to save Medicaid payments for medically necessary abortions through the federal court route without having to use the state Equal Rights Amendment and possibly fuel the national anti-ERA movement. But the loss in [Harris v.] McRae was the last straw. We now have no recourse but to turn to the State Constitution for the legal tools to save Medicaid funding for abortions."

Another piece of evidence showing the ERA-abortion connection is attached. This analysis was prepared at my request by the Senate

Republican Policy Committee and I ask that it be printed in the hearing record in its entirety as part of my statement.

Mr. Chairman, to me the evidence is conclusive. There is an ERA-abortion connection and the connection can be severed only by the adoption of a specific, abortion-neutral amendment to the text of the amendment itself. Report language alone is insufficient, as is the content of such expression of legislative intent as may be expressed on the Senate floor. We must make every effort to be precise when our actions on issues as legislators impact on issues as controversial and fundamental as abortion. We cannot abrogate our legislative duty by allowing the courts to define our intent. We must give our meaning with a greater rather than a lessor degree of specificity. Certain friends of the Equal Rights Amendment do not want to say what they mean specifically. They desire instead a broad "mandate for equality" as they are pleased to call it. Those of us who have watched in dismay the Supreme Court's rendering of the Due Process Clause in the abortion cases are reluctant indeed to see the High Court turned loose to tell us what the Equal Rights Amendment means.

In the Spring of 1947, Justice Felix Frankfurter delivered to the Bar of the City of New York a famous lecture which he entitled "Some Reflections on the Reading of Statutes." Justice Frankfurter said, "Emerson says somewhere that mankind is as lazy as it dares to be. Loose judicial reading makes for loose legislative writing. It encourages the practice illustrated in a recent cartoon in which a Senator tells his colleagues, 'I admit this new bill is too complicated to understand. We'll just have to pass it to find out what it means.'"

We cannot afford such laziness in considering the Constitution. Loose legislative writing surely makes for loose judicial reading. We must not be guilty of re-enacting in 1984 the cartoon Justice Frankfurter described in 1947.

The evidence of an ERA-abortion connection is compelling. The burden of proof should now be on those who say they can see no connection. Let them disprove it if they can. Fortunately, because of the work of this subcommittee and others, we do not need to pass ERA to find out what it means. ERA means abortion, and for me that is an excellent reason to oppose it.

Thank you.

[illegible]
HOWARD H. BAKER, JR.
WILLIAM S. COHEN
ROBERT DOLE
PETE V. DOMENICI
JAKE GARN
BARRY GOLDWATER
ORRIN G. HATCH
MARK O. HATFIELD
JOHN HEINZ
JESSE HELMS
CHARLES McC. MATHIAS

United States Senate
REPUBLICAN POLICY COMMITTEE
SR-347 RUSSELL SENATE OFFICE BUILDING
WASHINGTON, D.C. 20510

BOB PACKWOOD
CHARLES H. PERCY
WILLIAM V. ROTH, JR.
ALAN K. SIMPSON
ROBERT T. STAFFORD
TED STEVENS
STROM THURMOND
LOWELL P. WEICKER, JR.
PETE WILSON

RICHARD E. THOMPSON,
STAFF DIRECTOR

November 14, 1983

Honorable Jake Garn
United States Senate
Washington, D.C. 20510

Dear Senator Garn:

A member of your staff has asked me to provide you with the most recent information and analysis of the effect that ratification of the Equal Rights Amendment would have on the Congressionally-enacted restrictions on abortion funding. (Throughout this letter, these restrictions are referred to as the Hyde Amendment. The Hyde Amendments on Labor-H.H.S. appropriations bills have taken a variety of forms, and abortion funding restrictions have been enacted on other measures which were not amendments of Congressman Hyde.)

This letter is written without benefit of the House Judiciary Committee Report on H.J.Res 1, the proposed Equal Rights Amendment. The report is not available, although the House may consider H.J.Res. 1 as early as tomorrow, under a suspension of the rules. This letter does incorporate the views of witnesses as presented in their typewritten statements, and the deliberations of the subcommittee and full committee in the House. Of course, the hearings are not yet printed. (On a motion of Mr. Sensenbrenner, the House Judiciary Committee agreed to have the mark-up of H.J.Res. 1 printed. This committee print, together with the committee report, will constitute a portion of the legislative history.)

On June 30, 1980, by a vote of 5-to-4, the Supreme Court of the United States upheld the constitutionality of the Hyde Amendment. Harris v. McRae, 448 U.S. 297 (1980). On the same day, the constitutionality of a state abortion funding restriction was upheld by the same narrow margin. Williams v. Zbaraz, 448 U.S. 358 (1980) (Illinois statute). The 1980 cases dealt with medically-necessary abortions. The issue of funding for non-therapeutic abortions was disposed of in 1977 when the High Court upheld such restrictions by a vote of 6-to-3. Beal v. Doe, 423 U.S. 438

(1980) (Medicaid as restricted by Pennsylvania's abortion restrictions--the Court construed the Social Security Act) and *Maher v. Roe*, 432 U.S. 464 (1980) (Medicaid as restricted by Connecticut's abortion restrictions--the Court construed the constitution).

In *Harris*, the Hyde Amendment withstood challenges brought against it under the First and Fifth Amendments. The First Amendment arguments are not particularly important here. The challenges brought on Fifth Amendment grounds were of two sorts: First, it was alleged that the Hyde Amendment impinged on the liberty protected by the Due Process Clause of the amendment which *Roe v. Wade*, 410 U.S. 113 (1973), had held to include the right of a woman to decide whether to terminate her pregnancy. Second, it was alleged that the Hyde Amendment violated the equal protection component of the Due Process Clause of the Fifth Amendment. The Court has held that the Fifth Amendment contains an implicit guarantee of "equal protection of the laws." See, *e.g.*, *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

The due process-liberty argument was disposed of in these terms:

> [R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in Wade, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.

448 U.S., at 316.

For equal protection purposes, the Court analyzed the Hyde Amendment with its two-tiered formula for judicial review:

> "We must decide, first, whether [state legislation] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the [legislative] scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination. . . ."

Maher v. Roe, 432 U.S. 464, 470, (1977), quoting *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

In *Harris*, the Court held that no constitutionally protected fundamental right was abridged (see the quotation on the "due process-liberty right," above.) In asking whether the Hyde Amendment operated to the disadvantage of some suspect class, the Court followed its position in *Maher*:

> An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases. Nor does the fact that the impact of the regulation

> falls upon those who cannot pay lead to a different conclusion. In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.

324 U.S., at 470-71 (citations omitted).

Having determined that the Hyde Amendment neither disadvantaged a suspect class nor impinged upon a fundamental right, it remained for the Court to determine whether the Hyde Amendment furthered "some legitimate, articulated state purpose." "Where, as here, the Congress has neither invaded a substantive constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate governmental interest." 448 U.S., at 326.

The government argued on behalf of the Hyde Amendment, and the Court agreed, that the abortion funding restriction bore "a rational relationship to [the government's] legitimate interest in protecting the potential life of the fetus." Id., at 324.

> [T]he Hyde Amendment, by encouraging childbirth except in the most urgent circumstances, is rationally related to the legitimate governmental objectives of protecting potential life. By subsidizing the medical expenses of indigent women who carry their pregnancies to term while not subsidizing the comparable expenses of women who undergo abortions (except those whose lives are threatened), Congress has established incentives that make childbirth a more attractive alternative than abortion for persons eligible for Medicaid. These incentives bear a direct relationship to the legitimate congressional interest in protecting potential life. Nor is it irrational that Congress has authorized federal reimbursement for medically necessary services generally, but not for certain medically necessary abortions. Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life.

448 U.S., at 325 (footnotes omitted).

In summary, three years ago the constitutionality of the Hyde Amendment was upheld by the Supreme Court by the narrowest of margins. Because the abortion funding restriction did not infringe a fundamental right (there is no constitutional entitlement to the financial resources needed to pay for an abortion) and because the restriction did not operate to the detriment of a suspect class ("An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes. . . ."), the Congressionally mandated abortion funding restriction was required to meet only the "rational basis" standard of judicial review. This standard was met when the Court recognized that the abortion funding restriction "bears a rational relationship to [government's] legitimate interest in protecting the potential life of the fetus."

The Hyde Amendment survived judicial scrutiny under the Court's minimum standard. Would it have survived a more searching judicial inquiry? An inquiry in which the statutory restriction would have been subjected to strict judicial scrutiny requiring justification by a compelling state interest? The answer cannot be known with certainty, of course, but the probability that the Hyde Amendment would have survived a heightened standard of review is extremely low. Most commentators regard the Japanese Relocation Cases as the most recent examples of statutes which have been submitted to strict judicial scrutiny and been held constitutional. See, e.g., Korematsu v. United States, 323 U.S. 214 (1944). (Because an ethnic classification was used, the statute was "immediately suspect" and subject to "rigid scrutiny." Id., at 216.) The Japanese Relocation Cases have been roundly criticized and in view of the recent action of a federal district court in California which now has dismissed the indictment against Mr. Korematsu their value as precedent is highly doubtful.

The Equal Rights Amendment will require the Hyde Amendment to pass muster under the Court's elevated standard of strict judicial scrutiny.

> The general principles on which the Equal Rights Amendment rests are simple and well-understood. Essentially, the Amendment requires that the federal government and all state and local governments treat each person, male and female, as an individual.

S.Rep. no. 92-689, 92d Cong., 2d Sess. 11 (1972).

> The basic premise of [the ERA] in its original form is a simple one. As stated by Professor Thomas Emerson of Yale University, one of the Nation's foremost authorities on constitutional law, the original text is based on the fundamental proposition that sex should not be a factor in determining the legal rights of women or of men.

Id., quoting H.R.Rep. no. 92-359, 92d Cong., 1st Sess. 6 (1972) (Separate Views [of Congressmen Don Edwards, Peter Rodino, Robert Kastenmeier, John Conyers, Paul Sarbanes, and others]). See also, Brown, Emerson, Falk and Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 Yale L. Jn. 871, 889 (1971).

The general principle of the Equal Rights Amendment (according to the theory of the amendment propounded in the Yale L. Jn., which is clearly the leading theory) "does not preclude legislation . . . which regulates, takes into account, or otherwise deals with a physical characteristic unique to one sex." Id., at 893. Laws dealing with abortion are laws taking into account a physical characteristic unique to one sex. These kinds of laws "raise[] questions which should be carefully scrutinized by the courts." "A court faced with deciding whether a law relating to a unique physical characteristic was a subterfuge [for discrimination that would evade the broad mandate of the amendment] would look to a series of standards of relevance and necessity. These standards are the ones courts now consider when they are reviewing, under the doctrine of strict scrutiny, laws which may conflict with fundamental constitutional rights." Id., at 894. So, laws regulating or taking into account unique physical characteristics will be subjected to strict judicial scrutiny; to be upheld, such laws must be justified by, and closely and narrowly related to, a compelling state interest.

Ann E. Freedman, one of the coauthors of the *Yale L. Jn.* article, and now a professor of law at Rutgers, explained the rule of the Equal Rights Amendment in the following manner in her testimony to the House Judiciary subcommittee:

> The ERA also requires strict scrutiny of classifications based on physical characteristics unique to one sex to assure that such classifications do not undermine the equality of the sexes. To treat people differently on account of characteristics unique to one sex is to treat them differently on account of their sex. Although such classifications are not prohibited outright, because there are a limited number of circumstances in which their use is justified, the state would bear the burden of demonstrating that such classifications are necessary and the reasons for them compelling. The dissent of Justice Brennan in *Geduldig v. Aiello* [417 U.S. 484 (1974)] illustrates the approach contemplated by the ERA. Unlike the Supreme Court, Congress has recognized the importance to working women of equal treatment of pregnancy-related disabilities and rejected stereotyped characterizations of pregnant workers by passing the Pregnancy Discrimination Act of 1978. The ERA would provide a constitutional foundation for the protection of women from governmental discrimination based on such stereotypes.

Statement of Ann E. Freedman before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee at 5 (mimeo) (Nov. 3, 1983).

The Chairman of the House subcommittee, Don Edwards of California, accepts the understanding that classifications based on unique physical characteristics will be subjected to strict judicial scrutiny. The following colloquy took place during mark-up at the full committee level.

The questioner is Hamilton Fish, Ranking Minority Member of the full committee. This account is from a tape recording of the mark-up session:

> Mr. Fish. "Under the language of the proposed amendment, would a pregnancy classification be discrimination based upon sex?"
>
> Mr. Edwards. "It's a classification based on unique physical characteristics, but not on gender or sex."
>
> Mr. Fish. "Not on gender or sex?"
>
> Mr. Edwards. "Well, each person [whether a man or a woman(?)] is judged on unique physical characteristics."
>
> Mr. Fish. Is the chairman saying then that the rational basis test which is applied today will continue to be applied after the passage of this amendment?"
>
> Mr. Edwards. "We believe it would be a strict scrutiny test."
>
> Mr. Fish. It would not be the rational basis, it would be the strict scrutiny test? Well then, I guess that the committee report will state that on the standard of judicial review that is to be used by the courts [inaudible] the strict scrutiny test should apply."
>
> Mr. Edwards. "I believe so."

Chairman Edwards subscribes to the position that classifications based on unique physical characteristics will require strict scrutiny under the Equal Rights Amendment. Unlike Professor Freedman who testified that "[t]o treat people differently on account of characteristics unique to one sex is to treat them differently on account of their sex," Mr. Edwards said that a pregnancy classification is not a gender or sex classification. Still, he says ERA will require such a classification to undergo strict judicial scrutiny. Mr. Edwards must be wrong about the nature of pregnancy classifications, for if pregnancy classifications are not classifications based on sex then the Equal Rights Amendment could not require that they be strictly scrutinized. Section 1 of the proposed amendment reads, "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." If this language is going to require pregnancy classifications to be submitted to strict scrutiny as Mr. Edwards twice said it would (and in this view he is in agreement with the preponderance of the amendment's proponents), then a pregnancy classification must fall within the terms of the amendment and be a "denial or abridgment" of "equality of rights" "on account of sex." After all, ERA only changes the constitutional law of sex discrimination, and if pregnancy classifications are not sex discrimination then ERA is incapable of mandating that such classifications undergo strict judicial scrutiny where such high scrutiny has not before been required.

In Harris v. McRae, the Hyde Amendment was upheld after being submitted to the minimal, rational basis, standard of judicial review. The Equal Rights Amendment will require the Hyde Amendment to withstand strict judicial scrutiny. Under ERA, the government will have the burden of showing that the restrictions of the Hyde Amendment are closely and substantially related to the achievement of compelling governmental interests. In Harris, the Hyde Amendment was found to be "rationally related to the legitimate governmental objective of protecting potential life." 448 U.S., at 325. In terms of Constitutional law analysis, the "legitimate objectives, rationally related" which were approved in Harris are a far, far cry from the compelling showing that will be required under the strict scrutiny which ERA will mandate.

Theoretically, of course, it is possible to show that abortion funding restrictions can be justified by compelling state interests. We are not restricted to theoretical speculation, however. We know what the Supreme Court thinks about this theory.

In Roe v. Wade, 410 U.S. 113, 162 (1973), the Supreme Court held that the state has an "important and legitimate interest in protecting the potentiality of human life." "With respect to [this] important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." Id., at 163-64. Cf., Harris v. McRae, 448 U.S., at 316.

It is important to note that the interest of the state which was recognized in Roe v. Wade was not a compelling one, but an "important and legitimate" one. This "important and legitimate" state interest reached a "compelling point" at viability. This is when the state could act to protect "the potentiality of human life." However, if an abortion was "necessary to preserve [either] the life or health of the mother[,]" then the state's interest could never be compelling regardless of the advanced state of the pregnancy. (In a companion case decided the same day, the Court said that a woman's physician's "medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." Doe v. Bolton, 410 U.S. 179, 192 (1973).)

The state's interest in protecting the fetus becomes compelling at viability. However, the state's interest can never be compelling enough to prohibit abortions necessary to preserve the mother's life (this exception is irrelevant in the context of the Hyde Amendment because the Hyde Amendment contains an express exception for funding in cases "where the life of the mother would be endangered if the fetus were carrier to term") or to prohibit abortions necessary for the mother's physical or mental or emotional or psychological or familial health. This position has recently been reiterated. *City of Akron v. Akron Center for Reproductive Health*, — U.S. —, 103 S.Ct. 2481, 2491-92 (1983).

If the Supreme Court's analysis and conclusions in the abortion privacy cases (relating to the interests of the state in regulating abortion) are transferred to the abortion funding cases of the future, and if the Equal Rights Amendment requires those cases to withstand strict judicial scrutiny (as its proponents say it will), then the state's interest in *not* paying for medically necessary abortions (physically necessary, emotionally necessary, mentally necessary, psychologically necessary, familially necessary, necessary by reason of age) could not become compelling before viability, and could not be compelling even after viability if the woman asserted a health "need." In short, the only women against whom the state could successfully assert its compelling interest in the protection of "potential life" would be those women who either do not wish an abortion or those who, in consultation with their physician, cannot arrive at a reason necessary for their physical, mental, emotional, psychological, or familial health, or their age.

The Equal Rights Amendment will require the Hyde Amendment to pass strict judicial scrutiny. At the present time, with the doctrine of *Roe v. Wade* and its progeny, the Hyde Amendment will be unable to pass the judicial test. *Harris v. McRae* will be reversed if the Equal Rights Amendment is ratified in its present form, and with its current legislative history. This is my view of the matter.

Sincerely,

Lincoln C. Oliphant

Lincoln C. Oliphant
Professional Staff Member

Senator **Hatch**. Ms. Freedman, we will turn to you for your statement and then we will turn to Mr. Noonan afterwards.

STATEMENTS OF A PANEL CONSISTING OF: ANN E. FREEDMAN, ASSOCIATE PROFESSOR OF LAW, RUTGERS UNIVERSITY LAW SCHOOL, CAMDEN, NJ; AND JOHN T. NOONAN, JR., PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA AT BERKELEY, BERKELEY, CA

Professor **Freedman**. I welcome this opportunity to testify before the committee about the impact of the proposed equal rights amendment on abortion rights. The addition of the ERA to our Constitution will be an important step toward equality of rights for women and its passage, in my opinion, is long overdue.

As I stated in previous testimony before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, it is my considered opinion that the ERA will have no practical impact on Federal constitutional decisionmaking concerning abortion and abortion funding, and that it is both unnecessary and undesirable to add an antiabortion amendment or any other specific amendment to the present text of the ERA.

I believe the issue of abortion is not germane to congressional consideration of the ERA, which should be promptly adopted on its own merits and should not be used as an occasion for a debate about the merits of the Supreme Court's decisions concerning the constitutional right to privacy.

Perhaps I can amplify at this point. I am not opposing debate about the merits of the Supreme Court's decision about privacy. I just do not think they should be debated in the context of the ERA because the ERA does not have a practical effect, in my opinion, on constitutional decisionmaking about abortion.

The reason that the ERA will not have a practical impact on judicial decisionmaking concerning abortion rights is because of the Supreme Court's well demonstrated commitment to an alternative form of constitutional analysis, the constitutional right to privacy.

There is no reason to believe that the Supreme Court will abandon privacy analysis and adopt a new form of constitutional analysis based on the ERA. On the contrary, there are powerful reasons to believe that the Court will continue to adhere to privacy analysis on the issue of abortion.

Thus, if the Supreme Court in the future wished to invalidate abortion funding restrictions, it is my opinion that they would do so under the constitutional right to privacy and not in reliance on the ERA.

The Supreme Court has repeatedly held that the constitutional right to privacy, including a woman's right to choose whether to continue or terminate her pregnancy during the first or second trimester, is a fundamental right, and that—and this is a quote from the Supreme Court decision in the *Akron* case—"restrictive State regulation of the right to choose abortion, as with other fundamental rights subject to searching judicial examination, must be supported by a compelling State interest." *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, —— U.S. ——, ——— (1983), describing and reaffirming the Court's holding in *Roe* v. *Wade*, 410 U.S. 113 (1973).

In other words, restrictions on abortion choice are subject to strict constitutional scrutiny under the constitutional right to privacy. Under the ERA, pregnancy-related laws would be subject to strict scrutiny. This is the same standard.

Were the Court to consider changing its mode of analysis from privacy to ERA and review abortion laws as pregnancy regulations, the standard of review would thus be the same as that already required under the constitutional right to privacy. Because both doctrines mandate the same level of scrutiny, there is no reason to expect the Court to switch its form of analysis or to reach different results if it were to do so.

The Court adhered to its holding concerning the use of strict scrutiny to review governmental restrictions on abortion choice in *Harris* v. *McRae*, while at the same time upholding the Government's power to structure medical assistance funding to favor childbirth over abortion.

The basis for the *McRae* holding, which is extremely important to my conclusion about the impact of the ERA on abortion rights, was that the use of the governmental funding power in the Medicaid statute was not a restriction on abortion choice.

In previous testimony before this committee, Representative Henry Hyde argued that it was "palpably, grotesquely incorrect" for the Supreme Court to "create" a constitutional right to abortion in *Roe* v. *Wade*. He went on to suggest that the ERA would provide an occasion for expanded judicial activism in the abortion area, leading the Court to abandon its ruling in *McRae* and require public funding of abortions.

Having now read Professor Noonan's testimony that is to be presented today, it is my understanding that he takes a somewhat similar position to that taken by Representative Hyde, although he gives some slightly different reasoning for his conclusion.

I believe both Professor Noonan's argument and Representative Hyde's argument prove too much. If the Justices' decisions concerning abortion have no principled basis in the Constitution, what prevented the Justices from continuing their purportedly unprincipled ways—I do not believe they were unprincipled, but that is the basis of Representative Hyde's and Professor Noonan's argument, as I understand it—why did they not continue those unprincipled ways in *McRae* by requiring public funding of abortion choice at that time?

I would suggest to the contrary that a majority of the Justices are committed to the distinction they drew in *McRae* between governmental discrimination against abortion choice and a governmental choice to favor childbirth through the medical assistance program. There is nothing in the ERA to cause them to abandon that distinction.

To put it another way, the constitutional right to privacy is at least of equivalent strength to the ERA's protection against sex discrimination. Because the right to privacy mandates strict scrutiny of restrictions on abortion, the right to privacy by itself provides sufficiently powerful tools for protecting abortion choice and no other tools are needed.

The outcome in various cases involving abortion depends on the Justices' views about the extent to which abortion choice has been affected by the governmental action in question, not on the doctrinal source within the Constitution of the standard of review to be applied.

My firm belief that sex discrimination analysis will not replace privacy analysis as the basis for Supreme Court decisions concerning abortion and abortion funding, whether or not the ERA is adopted, is buttressed by the dissenting opinions in the *McRae* case.

Several of the dissenters in *McRae* also dissented in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), and *Gilbert* v. *General Electric Co.*, 429 U.S. 125 (1976), on the grounds that in the circumstances presented in those two cases, discrimination on the basis of pregnancy was sex discrimination.

The ERA mandates a strict review of pregnancy-related regulations; the standard is basically the same as that adopted by the dissenters in *Geduldig* and *Gilbert*. In other words, from the point of view of the dissenters, we would not need the ERA to get strict scrutiny of pregnancy-related regulations. From the point of view of the dissenters, the equal protection clause would support such a result.

Nonetheless, neither the majority nor the dissenters in *McRae* sought to characterize the Hyde amendment as sex discriminatory in the *Harris* case, and *Geduldig* was not mentioned. So we have a group of dissenters who believe that the 14th amendment already requires strict scrutiny of classifications based on pregnancy. Yet, given the opportunity to assert that as the basis for the dissent in *Harris* and to suggest that a sex-discrimination analysis required a different result in *Harris*, they did not do so. Instead, the dissenters emphasized the importance of the constitutional right to privacy and criticized the majority's distinction between restrictions on abortion choice on one hand and funding provisions favoring normal childbirth over abortion on the other.

In other words, they kept their analysis within the framework of privacy. They believed the privacy analysis itself compelled a different result in the *McRae* case. Now, they did not prevail, but they did not, in their effort to support their position, turn to sex discrimination analysis.

To the extent that equal protection analysis was mentioned at all, it was not sex discrimination which was emphasized in either the majority or dissenting opinions. It was discrimination on the basis of wealth. If the dissenters felt that sex discrimination analysis was more appropriate or more powerful than privacy analysis as a tool for analyzing abortion funding issues, it is logical to assume that they would have used such an analysis in *McRae* rather than limiting themselves as they did to other types of constitutional analysis.

Sex discrimination arguments about abortion are not new. They have been made in 14th amendment cases and in State ERA cases. The important question is not whether such arguments can be crafted, but whether they will have any practical effect on the Supreme Court's decisions in the area of abortion.

In my opinion, sex discrimination arguments will not have any such effect, and privacy analysis will continue to frame constitutional debates about abortion for the foreseeable future. Under these circumstances, the repeated assertion of the ERA's impact on abortion, however well-intentioned those making the assertion, as a reason for opposing the ERA is, in fact, a red herring.

I would like to pause at this point and note that as an author of the 1971 Yale Law Journal article, which did not discuss abortion, I took an implication from Professor Noonan's testimony that suggested that the failure to mention abortion somehow showed a disingenuity; that the reason that I personally and other ERA proponents are for the ERA was in order to get a right to abortion and that we are just not saying so.

I resent that implication; it is absolutely not correct. In 1971, the idea that there would be a connection between abortion and sex discrimination analysis was even more farfetched than it appears today. And the reasons for my supporting the equal rights amendment have always been independent of my views about abortion choice.

I believe that the equal rights amendment is well justified on its own terms and I do not need any covert reasons to be for it.

I urge this committee to recommend that the Senate adopt the ERA without amendments of any description. The Constitution is a broad charter of governmental powers and personal rights and, as such, is properly written in general terms.

Constitutional provisions are intended to set forth broad principles to which the people of the United States commit themselves and their Government. They should not be confused with statutes which are used to implement the Constitution and make its guarantees more specific.

Legislative history is the time-honored vehicle for amplifying the meaning of the constitutional language and should be relied upon in this instance as well. If a variety of amendments to the ERA's basic text are proposed and all are rejected, the court interpreting the ERA will properly conclude that Congress intended the legislative history of the amendment to guide judicial interpretation.

In contrast, it is my opinion that the adoption of any so-called clarifying amendments, however well-intentioned, will cast doubt on the weight to be accorded to the remainder of the ERA's legislative history as a guide to judicial interpretation.

By choosing specificity more appropriate to a statute with regard to some issues and not with regard to others, the Congress will lay the groundwork for a negative implication with regard to those other issues, possibly including even issues Congress did not consciously consider.

Thus, in my view, there are powerful reasons to choose legislative history rather than amendments to the amendment as a mechanism for communicating the views of Congress about the ERA's meaning. Moreover, these reasons operate with regard to all amendments to the ERA's basic text and not just in the area of abortion.

Senator Hatch. Thank you, Ms. Freedman.

Mr. Noonan?

The **Chairman**. Mr. Chairman, would you excuse me just a minute?

Senator **Hatch**. Certainly.

The **Chairman**. The nomination of Mr. Taft to be a Deputy Secretary of Defense is up in Armed Services at 10. This is an extremely important nomination and, as the ranking member over there, I would like to ask you to excuse me at this time.

Senator **Hatch**. I would be happy to.

The **Chairman**. I do have some questions for both of these witnesses. I want to commend both of them for coming here and making able arguments. If you will answer these questions for the record, I would appreciate it.

Senator **Hatch**. We will submit the questions to you and if you could both answer them as quickly as you can, we would appreciate it.

Professor Noonan?

STATEMENT OF JOHN T. NOONAN

Professor **Noonan**. Thank you, Senator Hatch. I am pleased and honored to be here by invitation of this committee. I congratulate the chairman and the committee for their willingness to explore aspects and implications of the proposed equal rights amendment which are not immediately obvious from a simple inspection of its words; for their willingness to try to understand how the ERA will work in practice.

I am here as the representative of no organization and speak only as a law professor with some familiarity with how constitutional provisions are interpreted by courts of the United States.

I come with no animus against the ERA. I am a believer in the equality of men and women and a defender of the rights of both sexes. My only concern—I admit it at the start—is that the terrible scourge of legalized abortion which now devastates our country not be wittingly or unwittingly be given new strength by any formal amendment of the Constitution.

Senator **Hatch**. Mr. Noonan, would you mind bringing your microphone just a little closer, please?

Professor **Noonan**. Yes; it is plain beyond argument that the abortionists do not have the power to pass an amendment asserting abortion is a constitutional right. It would be a tragedy if the equivalent of such an amendment crept into the Constitution in disguise.

Now, I should like to submit the rest of my written statement and merely summarize the highlights.

Senator **Hatch**. Without objection, we will place the complete written statement in the record, and we appreciate your summarizing.

Professor **Noonan**. I am assuming, Mr. Chairman, that this committee is well informed of the basis on which Roe against Wade was decided. I am assuming we are not here to debate Roe against Wade. I have said nothing in my testimony—although Professor Freedman found it there, I said nothing about the basis of Roe against Wade or debated it.

But our interest is in what this new amendment would mean and I assume we are going to talk about it not as some abstract doctrine and not as something that was put forward a dozen years ago, but as something that will be interpreted by our present judiciary, the judges we now have in the Federal courts and in the Supreme Court, and it is the minds of those judges that we are interested in when we look at precedents.

Well, on that basis, I have looked at what the ERA means and I have come to the conclusion, first of all, that the ERA would mandate the Federal and State funding of abortion. If there are any medical aid programs at all funded by the States or by the Congress, the Supreme Court would mandate that they include abortion funding.

Senator HATCH. That is if the equal rights amendment passes and is ratified?

Professor NOONAN. That is right.

Senator HATCH. OK.

Senator METZENBAUM. Give us your reasoning for that, because it seems to me that it is a nonsequitur. I cannot find how you get to that point and since I know you are a professor of law, I am sure you have some legal reason that you have come to that conclusion because, frankly, I am not a professor of law, but I practiced law. I thought I was a pretty good law student and I just cannot follow your line of reasoning at all, Professor.

Professor NOONAN. I would be delighted to do that, Senator, but could I just give you my five conclusions, then I want to give you my reasons? I would like to put on the table what I think the conclusions are and then I will come to the reasoning.

The second conclusion is that the ERA will sweep away all existing restrictions on the abortion right—the restrictions that now exist in statutes requiring written consent by the woman patient, the statutes requiring consent or notification to the parents in the case of an immature, minor girl, and the cases sustaining some restriction of late-term abortions.

Third, the ERA will end the conscience clause exemptions which most States and the Federal Government have seen fit to insert on behalf of nurses who do not want to participate in abortions, doctors who do not want to participate in abortions, and hospitals that do not want to have their facilities used for abortions.

Conscience clauses to permit race discrimination would be unconstitutional. It would be the same with conscience clauses about abortion.

Fourth, and perhaps most significantly, the ERA would threaten the tax exemption of most of the religious schools and colleges of the United States because most religious schools and colleges as part of their religion, whether they are Jewish or Protestant or Catholic, do not believe in abortion and they discourage abortion among their students on religious grounds. Their tax exemption would be at stake, in the light of the *Bob Jones* case.

Finally, and perhaps most significantly of all, the ERA would provide a new basis in the Constitution itself for the abortion right which is now being so heavily criticized because of its reliance on privacy.

I was quite interested in Professor Freedman saying—I think I counted it three or four times in her statement and perhaps one or two times more in her oral delivery—she told you that the ERA will not have any practical effect on abortion; no practical effect, she said.

Well, we are all familiar with weasel words, and I am bound to say that "practical" here is such a weasel word. What does she mean by it? Will it not have a symbolic effect? Will it not have an intellectual effect? Will it not have an effect on the text of the Constitution? Of course, it will.

Those of us who are in academe are quite interested in symbolic effects and intellectual effects and what the meaning of words are in the Constitution. And I am surprised, frankly, that a law professor could use a word like "practical effect" and say that is what we are talking about.

Well, it would be a very significant intellectual, symbolic and practical effect if you had a new basis for abortion in the Constitution.

Now, Senator Metzenbaum asked for my reasons and I would like to go through the reasons, Senator, in an orderly fashion. When I got into this, I started with Professor Freedman's article written when she was a student at Yale, with the collaboration of Professor Emerson at Yale, and I noticed they dreamed up an exception to the ERA when they were first talking about it.

They dreamed up the idea that if there was a unique physical characteristic that was affected by a law, that would not necessarily be bad. It might be bad. They said it would be subject to strict scrutiny, but it would not have to be thrown out.

I wondered what was meant by "unique physical characteristic" and I was enlightened, Senator Metzenbaum, by the brief of Professor Freedman and Professor Emerson in the *General Electric/Gilbert* case, which was the pregnancy discrimination case.

In that case, under title VII, they told us that pregnancy was not a unique physical characteristic because, of course, the operation to take care of it was a medical operation. The patient would be laid up for a while and those are characteristics which the operation for pregnancy shared with other operations performed on men.

And the way they formulated the test then was to say the operation affected by the law has to be precisely and exclusively affected by the law. Pregnancy was not precisely and exclusively affected because an operation which was common to both sexes in being an operation and requiring the patient to be out of work for a time was involved.

So a pregnancy operation was not meeting the test and I concluded from that that, of course, abortion would not meet the test because abortion, just like a pregnancy operation, does require medical attention; it does mean that the patient is laid up for a while and it would not pass the precisely and exclusively physical characteristic test.

Justice Brennan, dissenting in the *Gilbert* case, provided me another whole range of illustrations of operations performed on men which affect their reproductive system. Vasectomies were one example, and he said that all these affect the male reproductive system. Here is something that affects the female reproductive system; there is nothing unique about it.

I think it is perfectly apparent that how you classify something as a unique physical characteristic depends on your purpose in classifying it. It is easy to say something is a medical operation; something affects the reproductive system. It does not hold up as a basis for discriminating pregnancy from other operations.

Now, I state this because Professor Freedman and I think Professor Emerson perhaps still hold to that analysis, but I want to tell you right now that it is old hat because the Supreme Court has not bought it. What the Supreme Court has bought is in their most recent case in the title VII sex discrimination area, *Newport News Shipbuilding.*

Now, strangely enough, this case is not mentioned by Professor Freedman in her testimony before this committee or before the Edwards committee. But strangely enough, too, the dissent that she says should be the law does become the law. The *General Electric* dissent now is the law as the result of the Newport News opinion of the 1983 term.

The *Newport News* case, I would like to go into briefly.

Senator METZENBAUM. Professor Noonan, before you do that, I understand how you disagree with Professor Freedman's article, but I do not understand—and I follow your words, but I do not follow your reasoning because you have not answered the question that I asked you.

Professor NOONAN. Yes.

Senator METZENBAUM. You said that ERA would mandate funding of abortions by States and Federal Governments; that ERA would sweep away all present restrictions on abortions; that ERA would end the conscience clause exemptions for doctors, nurses, and hospitals; that ERA would threaten the tax exemption of schools with respect to their teaching practices; and that ERA would provide a new basis in the Constitution for abortion rights.

Now, it is one thing to say something; it is another thing to back it up with a legal argument that has some validity to it. I asked you that question; you have not answered it at all. You have not even touched upon it. You have told me only about Professor Freedman's article.

Now, tell me, where and how do you figure that the ERA amendment would mandate funding of abortions by States and the Federal Government?

Professor NOONAN. Because, Senator Metzenbaum, the precedent that we have under title VII shows how the ERA would be interpreted.

Senator METZENBAUM. How?

Professor NOONAN. The precedent under title VII shows that if you discriminate against pregnancy, you have committed an offense under title VII of the Civil Rights Act.

Senator METZENBAUM. That is a nonsequitur. You are not getting me to funding by the States and the Federal Government.

Professor NOONAN. It is not a nonsequitur.

Senator METZENBAUM. The two are totally different.

Professor NOONAN. Excuse me, Senator. If you will give me a chance to complete my sentences, I would appreciate it.

Senator **Metzenbaum**. Sure.

Professor **Noonan**. It is perfectly clear from everything the advocates of the ERA have said that title VII is a precedent. In fact, Professor Freedman's statement, if you will read it, says that the ERA—I am quoting her now—"mandates the analysis adopted by the dissenters in *General Electric*."

That dissent is now the majority opinion of the Supreme Court by virtue of *Newport News*. That dissent, now the majority opinion, says—let me give you their test—if a woman would get an operation, but for the fact that she is a woman, and is denied it on that basis, that is sex discrimination.

Now, you take that title VII precedent and move it right over to the meaning of the ERA. If it is going to be illegal under title VII, it is also going to be illegal under the ERA because the words are almost the same.

Title VII says you cannot discriminate in employment because of sex or on the basis of sex. The ERA says you may not discriminate on account of sex—virtually the same words.

Senator **Metzenbaum**. OK.

Professor **Noonan**. Now, Congress, when it passed the Pregnancy Discrimination Act in 1978, saw that and so they exempted from the pregnancy discrimination anything to do with abortion. They wrote in on a statutory level the equivalent of the Sensenbrenner amendment to the ERA. They said this does not apply to abortion. They are not writing it now into the ERA; the ERA is unrestricted.

So if you take the *Newport News* case and apply what Justice Stevens says repeatedly is a very simple test, you ask yourself, would she be getting this operation but for the fact that she is a woman? The answer is simple: Yes, she would be getting it. Everybody else is getting medical attention. Why is she not? Because she is a woman. But for the fact that she is a woman, she would get it. Therefore, she has got to get it.

Senator **Metzenbaum**. I understand what you are telling me about discrimination and title VII. I understand your arguments with respect to the applicability of ERA. I understand it. I do not agree with it, but be that as it may, tell me very simply how you get from that point to the point where you say that ERA would mandate funding of abortions by States and the Federal Government.

Senator **Hatch**. Well, first, let us let him finish his statement.

Senator **Metzenbaum**. Well, no.

Senator **Hatch**. Now, wait. If you want to read his arguments, read the 27-page statement that he made because he answers it very clearly there.

Senator **Metzenbaum**. No. You will probably next ask me to read your book. [Laughter.]

Senator **Hatch**. I do want you to read good literature.

Senator **Metzenbaum**. It is a very nice book on the equal rights amendment.

Senator **Hatch**. Let us let him finish his statement and then we will have plenty of time for questions.

Professor **Noonan**. Senator, I am happy to continue just a little bit, if I may, on this line because I think this is a very legitimate question.

Senator **Hatch**. Sure.

Senator **Metzenbaum**. I want to say, Professor, that my question with respect to the funding is equally applicable to the other four assertions you made.

Professor **Noonan**. I understand that.

Senator **Metzenbaum**. I understand the arguments you are making about Professor Freedman's——

Professor **Noonan**. May I go through this?

Senator **Metzenbaum**. Please do.

Professor **Noonan**. There are three steps. Step one is: title VII cases are good precedents for what the ERA will mean. That is the position of virtually everybody.

Senator **Hatch**. I believe, Professor Freedman, that you agree with that as well. You stated on page 222 of your book, "Women's Rights and the Law," which you authored with Barbara Brown, that the ERA provides a mandate to consolidate the changes brought about by title VII. Is that correct?

Professor **Freedman**. Certainly, as it regards employment discrimination; in general, I agree.

Senator **Hatch**. But not with regard to sex discrimination specifically?

Professor **Freedman**. In general, I agree that most title VII precedents are good, and I certainly agree that the *Gilbert* and *Geduldig* dissents, which have essentially the same analysis, use the same test as the unique physical characteristics standard under the ERA, as I have stated.

So in terms of the specific question, absolutely, and in general I cannot think of a title VII precedent offhand that does not apply. There might be one somewhere.

Senator **Hatch**. I cannot think of one either.

Professor **Noonan**. So this is common ground. We know what the Supreme Court thinks and will do under title VII. So, now that we know what sex discrimination means, we move ahead and say, suppose we have a constitutional amendment; it is going to be the same reasoning.

If it is sex discrimination to deny something to a woman because she is a woman, it is going to be sex discrimination to deny her an abortion. Therefore, all those consequences follow.

Senator **Hatch**. Is that because the equal rights amendment would raise gender to a suspect classification?

Professor **Noonan**. Well, Senator, I think it actually goes beyond that. Though I defer to the language that people like to talk about, I actually prefer the language of the Court.

The Court has told us we have a simple test now. They do not even talk about strict scrutiny; a simple test, they say: but for the fact that she was a woman, would she be getting this?

Senator **Metzenbaum**. OK.

Professor **Noonan**. Would she be getting the medical attention under the medical programs except for the fact that she is a woman? Obviously, if the men are getting it, why is she not getting it? Because she is a woman.

Senator **Metzenbaum**. Now, tell me how you get to the point that ERA would mandate funding of abortions by States and the

Federal Government. Get me over the gap because it is a chasm for me.

Professor **Noonan**. All right. There is a constitutional discrimination. The Court has held that to deny this on the basis of sex is a discrimination. It is unconstitutional; therefore, the unconstitutionality must be remedied.

Senator **Metzenbaum**. That is reverse thinking. There is no denial in not providing funding. We do not provide funding for a lot of things. But you are saying that we would be obligated as a Congress to provide funding for abortion, and I am saying to you that nothing you have said to this moment has led me to that legal conclusion.

Professor **Noonan**. I think you may have missed what I said at the beginning, Senator, that if you have a medical program, if you are going to provide in the way you do and the way the States do for all kinds of medical necessities, and deny this one, you are going to be found guilty of unconstitutional sex discrimination by the Supreme Court, as presently constituted.

So I wonder what is missing in your reasoning about it, but perhaps I should continue. Now, the *Newport News* case is conclusive as to what is meant here, and I would like to spell that out in the context of tax exemption because here the whole issue has been illuminated by another case of the 1983 term, the *Bob Jones* case, and I would like to go through a little bit of what *Bob Jones* decided.

Bob Jones University was a biblically based university that believed on the basis of the Bible that interracial dating was bad, and it discouraged interracial dating among its students.

The Internal Revenue Service removed its tax exemption. Bob Jones sued to get it back and the Supreme Court, 8 to 1, held that it was not entitled to the Federal tax exemption.

In the course of deciding that, Chief Justice Burger, writing for the Court, said you cannot be a public charity if you are at odds with the common community conscience; I quote the Chief Justice: "At odds with the common community conscience."

What is the common community conscience? It is the Constitution, as interpreted by the Court. It is perfectly plain that as abortion would be sex discrimination under title VII, if Congress had not put in an exemption, and as it would be sex discrimination under the ERA by the reasoning of the present Court, the Constitution would be opposed to any of our religious schools.

Senator **Metzenbaum**. Are you saying, Professor, that the Constitution is the determinant as to what the common community conscience is?

Professor **Noonan**. I do not believe that, Senator Metzenbaum, but Chief Justice Burger and a majority of the Supreme Court believe it. When they are looking at the common community conscience—they say so in *Bob Jones*—they are looking at the Constitution.

To use another phrase from the Chief Justice, he said that to qualify for a tax exemption, a charity must demonstrably serve and be in harmony with the public interest. Again, for racial purposes, he looked to the Constitution to determine what was demonstrably in harmony with the public interest.

You can see the same reasoning would apply here in the sex discrimination field, and it has been made easy for the people who would like to take the tax exemptions away to challenge them all around the country because the Supreme Court in another case, the *Green* case, has said all a taxpayer has to do is to go into a Federal court and claim that the local charity is not in harmony with the public interest. And that single Federal district judge will have power to remove the tax exemption. And then you have got an appeal to a court of appeals and maybe to the Supreme Court, if it will hear it.

I can see, if the ERA is enacted, all around the United States—maybe not Planned Parenthood itself, but certainly an affiliate here, an affiliate of the ACLU there—will challenge the tax exemptions of schools that discourage abortion, and you can see put in jeopardy a whole heritage of our moral and religious life.

The only recourse those threatened schools and colleges will have will be to go to Congress and try to renegotiate with Congress something else in 501(c) of the Internal Revenue Code. Maybe they will get it; maybe they will not. Maybe the Court will not let Congress give it to them because the Court has taken over this area and laid down its own common law rules as to what a public charity is.

So we are inviting, at the very least, serious litigation and, at the maximum, an absolute barrier. I know some of the people on the other side like to talk about choice. The choice the religious schools will have is: Give up your tax exemption or give up your moral and religious principles and permit abortion to be a way of life on your campuses. I think it is a terrible choice to present to the Catholic and Protestant and Jewish schools of the country.

Senator **Metzenbaum**. Professor Noonan, I have to say to you that I think that your five points that you make really do not, as I see it—as this lawyer sees it, I cannot follow your legal reasoning, including the one that you just made because I can think of a host of instances in which the common community conscience varies from the provisions of the Constitution, and yet we recognize constitutional rights.

That does not mean that in this instance you are going to be able to take a constitutional amendment, when and if passed, and apply that to all of these religious schools and cause it to have some applicability with respect to the points you make, and the other three points you make as well.

I just have difficulty in following your reasoning. I think some of these points are a red herring that are smeared over the ERA, and I think that for a professor to come before us and give us some of what I consider to be really convoluted, legalistic reasoning is extremely difficult for this member of the committee to comprehend.

Now, I thought I was going to hear you give us some logic and reason for how these issues would follow. You talk about the fact that if you provide some medical advantages, then you are going to be required to provide funding. We do not provide a lot of funding for medical problems in this country.

Nobody claims that there is a constitutional right to be paid for treatment of cancer or treatment of hepatitis, but not to be paid for eyeglasses or dental care or some of the things that we exclude. We probably ought not to exclude them, but nobody has raised the constitutional issue that there is a constitutional discrimination against people who need glasses. I do not think we provide glasses.

Professor NOONAN. Well, sure, you are right, Senator, because they are not being discriminated against on the basis of sex. If only the women were denied glasses, you would hear a great complaint.

Now, here is an operation which is peculiar to women which would be denied funding. That is sex discrimination under the ERA by the standards of the Court in title VII.

Senator HATCH. The way to resolve it is to add one simple line to the equal rights amendment stating that nothing in this article will affect abortion funding or abortion rights. But, every time we raise this suggestion the people who say the equal rights amendment will not affect abortion refuse to consider qualifying language to be added. They say they will fight it. Senator Packwood is an example.

I think your reasoning is very, very clear, especially in light of the narrow marging in cases such as *McRae*. We have never raised gender to the level of a suspect classification.

Professor NOONAN. That is exactly true, and I would like to make this comment: of course, Senator Metzenbaum——

Senator HATCH. These are difficult constitutional issues.

Professor NOONAN. Of course, all of us studied constitutional law at an earlier period, but the Constitution, unfortunately, is subject to what the majority of the Supreme Court is saying.

Now, I would not have been sure how *Bob Jones* would have come out, but now I see how the Chief Justice interprets the Constitution. That is new law; that is new constitutional law. He got seven other Justices to agree with the result and six to agree with the opinion, so *Bob Jones* is new.

All these things you think about, Senator—maybe they are bad, if you apply his view of the common community conscience.

Senator HATCH. Professor, since we are going to reserve time for questions, I would like you to be uninterrupted and finish your statement.

Professor NOONAN. I am essentially at the end. It is obviously a dilemma for persons who have supported the ERA in good faith on the representation that abortion was not involved and who believe themselves that abortion is a serious attack on human life. It is a dilemma for them to face the ERA without amendment.

As you said, Mr. Chairman, there is a very simple way of removing this dilemma and removing their fears and removing this argument; it is to amend the ERA to provide that it has nothing to do with abortion funding or abortion rights. That would solve all these problems in a sentence.

Thank you.

[The prepared statement of Mr. Noonan and responses to written questions from Senator Thurmond follow:]

PREPARED STATMENT OF JOHN T. NOONAN, JR.

I am pleased and honored to be here by invitation of this committee. I congratulate the chairman and the committee for their willingness to explore aspects and implications of the proposed Equal Rights Amendment not immediately obvious from a simple inspection of its words -- for their willingness to try to understand how the ERA will work in practice.

I come as the representative of no organization and speak only as a law professor with some familiarity with how constitutional provisions are interpreted by courts in the United States. I come with no animus against the ERA. I am a believer in the equality of men and women and a defender of the rights of both sexes. My only concern -- I admit it at the start -- is that the terrible scourge of legalized abortion which now devastates our country not be wittingly or unwittingly given new strength by any formal amendment of the Constitution. It is plain beyond argument that the abortionists do not have the power to pass an amendment asserting, "Abortion is a constitutional right." It would be a tragedy if the equivalent of such an amendment crept into the Constitution in disguise.

When I approached the examination of the ERA I did so alive to such a danger, but with an open mind as to whether in fact the ERA created such a danger. I should like to set before the committee the assumptions on which I have proceeded, the conclusions I have reached, and the reasons for these conclusions.

Assumptions

1. I have assumed that when we seek the meaning of the ERA we are not looking at words abstracted from their context. We are looking at words as they would be understood in 1984 in the United States of America. We are not attepting the exegesis of words unfolded on some scroll

set in the heavens. We are looking at a constitutional amendment which has had proponents and a legislative history. We are looking at an amendment which will, if enacted, be interpreted by a federal judiciary pretty nearly the same as it is today. We are trying to ascertain what *these* federal judges will make of *these* words with *this* legislative history.

2. I have assumed that everyone knows that the principal basis on which *Roe v. Wade* was decided, and on which its holdings were recently reaffirmed in *City of Akron v. Akron Center for Reproductive Rights*, was the court-created doctrine of privacy. No one argues that the ERA or equal rights was the basis for these decisions. The question is whether the ERA would provide a substitute rationale if the privacy doctrine should be abandoned as their basis.

3. I have assumed that cases decided under the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Fifth Amendment -- in particular the Abortion Funding Cases -- are not authoritative guidance as to what the Supreme Court would do under a constitutional amendment specifically banning discrimination "on account of sex."

4. I have assumed that the course of the Court's changing position on Title VII of the Civil Rights Act from *General Electric Company v. Gilbert* in 1976 to *Newport News Shipbuilding* in 1983 does give guidance as to how the present Court would construe a constitutional amendment (the ERA) which so closely parallels Title VII in respect to sex discrimination.

Conclusions

The conclusions I come to are as follows:

1. It is certain that the ERA would have a substantial impact on litigation involving abortion rights.

2. It is highly probable that the ERA would require the federal and state funding of elective abortions.

3. It is highly probable that the ERA would invalidate existing vestigial restrictions on abortion.

4. It is probable that the ERA would invalidate the exemption now accorded to doctors, nurses, and hospitals objecting on grounds of conscience to the performance of abortions.

5. It is probable that schools and colleges discouraging abortion among their students by disciplinary regulations would lose their status as public charities and their tax exemption under the Internal Revenue Code.

6. It is highly probable that if the Supreme Court abandoned the privacy doctrine as a basis for abortion rights, the ERA would provide a new basis for establishing those rights.

7. It is possible that the ERA would provide two checks on abortion by establishing a constitutional basis for statutes extending to fathers a share in the decision to abort and for statutes prohibiting abortion on the basis of the sex of the unborn child.

8. On balance, although the ERA could be a means of imposing certain limits on the right to an abortion, the net impact of the ERA would be a pro-abortion impact. It is not too much to say that a vote for the ERA as presently drafted

is a vote for abortion. It is not too much to say tht there is an ERA-abortion connection and that in interpretation and effect the ERA will mean "Equal Rights for Abortion" in the governmental funding of abortion, the elimination of conscientious objection to abortion, the denial of tax exemption to educational institutions discouraging abortion, and the grounding of the abortion right in the text of the Constitution.

Reasons

I reach these conclusions both by consideration of the ERA as explained by its legislative history and by consideration of the decisions of the present Supreme Court. I shall examine these guides to the ERA's meaning in turn.

1. "Strict Scrutiny" and the "Unique Physical Characteristic" Test.

"Equal Rights for Men and Women," the Report of the Senate Judiciary Committee on the ERA in 1972, adopted the views of Congressman Don Edwards and thirteen other members of the House Judiciary Committee as stating "concisely and accurately the understanding of the proponents of the Amendment." According to them, the ERA would make gender a prohibited classification with an important exception. Sex classifications would be permitted if based on physical characteristics unique to one sex. 1/ Under this exception the key question is whether abortion is a procedure so dependent on a unique physical characteristic of women that the ERA has no application to it because equality has no meaning when applied to a unique characteristic. In other words, does the ERA simply bypass the whole heated area of the abortion controversy because only women can be pregnant and so only women can have abortions?

Would legislation taking into account such a unique physical characteristic of women qua women still be valid if the ERA were passed?

The Senate Committee Report followed a significant article by proponents of the ERA published in the *Yale Law Journal* in 1971. This article by Barbara A. Brown, Thomas J. Emerson, Gail Falk, and Ann E. Freedman -- I shall refer to it as the Brown-Freedman article -- was not only a gloss on the proposed amendment by articulate supporters of the amendment. It was distributed to all members of Congress. It was made part of the legislative history of the ERA by the amendment's congressional sponsors -- Congresswoman Martha Griffiths introduced it into the legislative history in the House; Senator Birch Bayh, the author of the *Senate Report*, introduced it into the legislative history in the Senate, observing that it was a "masterly piece of scholarship." The article is authoritative as to what the *Senate Report*'s "unique physical characteristic" exception meant. 2/

According to the Brown-Freedman article, there could be, if the ERA were enacted, legislation which applied differently to one sex, which would not necessarily be invalid. If a law "takes into account" physical characteristics unique to one sex, the law, the authors say, could be valid. 3/ But the law would have to be reviewed for constitutionality by the criteria courts use, "when they are reviewing, under the doctrine of strict scrutiny, laws which may conflict with fundamental constitutional rights." 4/ The usual example of strict scrutiny review is the review of laws discriminating on the basis of race. Very few statutes impinging on race survive strict scrutiny.

The Brown-Freedman article, and the *Senate Committee Report* following it, were silent -- even though they were written at a time before *Roe v. Wade* when abortion was a debated right -- as to whether or not abortion laws would survive strict scrutiny. The article did, however, give two examples of laws that would meet the test -- laws giving medical leave for the delivery of a child and laws punishing one species of rape. 5/ The Senate Committee Report adopted the example of a law paying the medical costs of child bearing. 6/ The article also gave laws that would not withstand strict scrutiny -- that would be unconstitutional if the ERA were the law of the land. These laws included the White Slave Traffic Act (the Mann Act) protecting girls and women from being used as articles of commerce in "white slavery"; 7/ laws prohibiting the statutory rape of girls under the age of sixteen; 8/ laws prohibiting rape by instrument; 9/ and laws defining rape to include a man forcing a woman to have sodomitic intercourse. 10/ None of these laws, the authors said, protect a unique physical characteristic of women. They protect an assumed social weakness (the Mann Act, statutory rape laws); or they prohibit acts which could be forcibly performed on men. In either case they are not sexually neutral and so are bad under the ERA. They could not survive "strict scrutiny." It is apparent from these examples that laws precisely and exclusively "taking into account" a physical feature not shared by the two sexes are few. Laws designed to protect women from sexual exploitation and assault are not sufficiently exclusive and precise to qualify.

The authors' approval of a law giving leave for delivery of a child did suggest that if a statute directly related to a woman's reproductive capacity it might survive strict scrutiny -- that despite the severity of the test, abortion laws might pass. But this possible inference was dispelled by three of the authors themselves. In 1975 in General Electric Company v. Gilbert Barbara A. Brown and Ann E. Freedman for the Women's Law Project joined with Thomas I. Emerson and representatives of the American Civil Liberties Union to file an amicus curiae brief with the Supreme Court. The brief explained that the Women's Law Project was "particularly concerned with the theory and implementation of the equal rights amendment" and that the ACLU wanted to end "gender-based discrimination." 11/ Jointly the authors of the brief stated how the ERA, if it had been in force, would have applied to General Electric's disability plan which excluded coverage for pregnancy.

GE was defending its plan on the ground that as men had no coverage for pregnancy, there was no discrimination; the sexes were treated alike; what was omitted was medical treatment of a condition physically unique to women. The Brown-Emerson-Freedman brief was scornful of this rationale. Their article had shown that discrimination of this kind would be subject to "strict scrutiny" under the ERA. Strictly scrutinized, pregnancy soon lost its uniqueness.

Pregnancy -- Brown, Emerson and Freedman observed -- is a condition which "possesses a number of properties, some of them shared with other conditions (need for medical care, period of disability) and some wholly unique (the birth of a child is the usual result). The uterus, too, shares some characteristics with the other organs (subject to disease and malfunction) and has some functions wholly unique to it (reproductive function)." Only if the GE plan related "precisely and exclusively to the reproductive function" would it satisfy strict scrutiny. Obviously, it did not. 12/

By the Brown-Emerson-Freedman standard only a statute relating "precisely and exclusively" to a unique physical characteristic can survive strict scrutiny. Could an abortion statute meet this test? Abortion does have some special aspects. It also shares some characteristics with other medical procedures -- it is an operation; it is dangerous to the patient; it results in temporary disability. Could a statute be so tailored that it did not bear on these "shared characteristics." It is hard to imagine such a statute. Just as a plan not funding pregnancy as a disability neglected the characteristics pregnancy shared with other medical conditions, so any law touching on abortion affects characteristics which abortion shares with other medical procedures. To regulate -- or not to fund -- a procedure with shared characteristics would violate the ERA by the Brown-Freedman test.

Moreover, by the Brown-Emerson Freedman standard is there anything so special about abortion that it could be classified as relating to a unique physical feature of women? Abortion eliminates what they say is unique about pregnancy when they acknowledge that "the birth of a child is the usual result." The usual result of an abortion is non-birth. Abortion reduces a woman to a non-childbearing condition. In this respect she becomes undifferentiated from a man. On the Brown-Emerson-Freedman analysis, a statute relating to abortion would not relate to a physical characteristic unique to women.

Suppose it is said that abortion relieves a woman of a burden which only a woman can bear -- that is what is unique about it. But a man can have a tumor that is unwanted. The operation which removes the tumor is very like an abortion in the eyes of those sympathetic to the abortion liberty. 13/ Those sympathetic to the abortion liberty are the great majority of federal judges who have decided abortion cases and a clear majority of the Supreme Court. It would be hard for the present judiciary to acknowledge that there was something so special about the burden relieved by abortion that the operation was not to be classified under the ERA with other operations destroying unwanted growths.

Reflection will convince us that what is to be classified as physically unique depends a great deal on the purposes of the classifier. Let us take some examples from Justice Brennan, another defender of strict scrutiny of sexual classifications, as he dissented in the eventual Gilbert judgment in favor of General Electric. He took note of GE's contention that there was no illegal discrimination because the risk of pregnancy was unique to women and observed that "risks such as prostatectomies, vasectomies, and circumcision . . . are specific to the reproductive systems of men." 14/ These risks were covered by GE's plan; hence, Justice Brennan argued, the plan discriminated against the reproductive systems of women. Here the classifier, wanting to prove discrimination, takes as the unit of comparison "the reproductive system." The uniqueness of childbearing disappears. By the same token, a judge sympathetic to abortion could take the reproductive system as the unit of comparison and find that a medical aid program which paid for prostate operations and vasectomies but not abortions failed the strict scrutiny test under the ERA.

Whether the category employed was "reproductive system" or "unwanted tumor" or "medical operation," it would not be difficult to find classifications which eliminated any uniqueness in abortion. By the Brown-Emerson-Freedman understanding of the ERA, any denial then of abortion rights would be constitutionally improper. Existing vestigial restrictions on abortion and abortion funding would be swept away by the ERA along with the White Slave Traffic Act, statutory rape and sodomitic rape.

2. "Strict Scrutiny" and the "But For" Test.

To this point I have explored the possibility that abortion would be an exception on the basis of the legislative history of the ERA. I now turn to the test developed by the Supreme Court in expounding a statute parallel to the ERA, Title VII of the Civil Rights Act. But as prelude to that test it must be noted that the Brown-Freedman exception on the basis of unique physical characteristics has not been adopted by all proponents of the ERA. Indeed, some interpreters of state ERAs take the opposite view -- the more a distinction is based on a unique feature of gender the more likely is it to be discriminatory.

In 1978, for example, certified providers of Medicaid abortion services moved to intervene in a suit seeking to enjoin Hawaii from funding elective abortions. The intervenors declared, "Abortion is a medical procedure performed only for women; withdrawing funding for abortions while continuing to reimburse other medical procedures sought by both sexes or only by men would be tan amount to a denial of equal rights on account of sex." 15/ In 1980, the Civil Liberties Union of Massachusetts, an affiliate of the ACLU, attacked the Massachusetts restriction on abortion funding, stating in its complaint, "By singling out for special treatment and effectively exclusing from coverage an operation which is unique to women, while including without comparable limitation a wide range of other operations, including those which are unique to men, the statutes constitute discrimination on the basis of sex, in violation of the Massachusetts Equal Rights Amendment." 16/ In 1982 the Women's Law Project, "particularly concerned with the theory and implementation of the equal rights amendment," filed a compalint against Pennsylvania's restriction on abortion funding. The complaint declared: "Pregnancy is unique to women. 62 P.S. sec. 453 and 18 Pa. C.S.A. sec. 3215(c), which expressly deny benefits for health problems arising out of pregnancy, discriminate against women recipients because of their sex." 17/

These interpreters of state ERAs were moving in the direction predicted for the Supreme Court by Ruth Bader Ginsburg (the director of the ACLU's Women's Rights Project, now Circuit Court Judge Ginsburg). She wrote in 1978, "Eventually the Court may take abortion, pregnancy, out-of-wedlock birth, and explicit gender-based differentials out of the separate cubbyholes in which they now rest, acknowledge the practical interrelationships, and treat these matters as part and parcel of a single, large, sex equality issue." 18/ In short, all the issues related to reproduction by women were to be handled under the rubric of equality. Judge Ginsburg was in fact prophetic. Her vision is, in fact, the one that the Court's recent decisions under Title VII make likely to be a reality if the ERA becomes the law of the land.

In the 1978 case of Los Angeles Department of Water and Power v. Manhart, the Supreme Court considered the lawfuless under Title VII of a city pension plan which made women contribute more than men on the ground that women live longer than men. The Court held the plan unlawful. Writing for the Court, Justice Stevens observed that the plan was based not on a fictional nor on a prejudicial stereotype of women. The plan was based on a reality. "As a class women live longer than men." 19/ Although the plan was based on a biological characteristic unique to American women as a class, it was an unlawful, gender-based discrimination. It was a discrimination which responded precisely to a physical characteristic of American women taken as a sex. In Justice Stevens' words, "Sex is exactly what it is based on." 20/

Being based on sex made the discrimination unable to pass what Justice Stevens characterized as a "simple test." The test was whether the evidence showed "treatment of a person in a manner which but for that person's sex would be different." 21/ By this test, if "but for" a woman being a woman she would be treated differently, such treatment by anyone subject to Title VII violates federal law. There is reason to believe on the basis of two cases decided in the 1983 Term that the present Supreme Court would use the "but for" test in applying the ERA to abortion.

In Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, Arizona arranged for women employees of the state to be paid smaller monthly annuity benefits than men employees. The Court struck down the scheme as it had struck down the Los Angeles plan and for the same reason. Writing for the Court, Justice Marshall reaffirmed the validity of the "but for" test. He did not dispute the actuarial basis for the Arizona scheme, that women do live longer. He equated the use of this biological characteristic of the class with the use of race in actuarial computations. Just as the use of race as a predictor might be actuarially sound but federally illegal, so was the use of sex. 22/ By the "but for" standard, a legal provision which was based on gender could not be the basis of state action.

Now it might be thought that both the Los Angeles and Arizona plans were unlawful because they discriminated against individual women who were shorter-lived than the average, and in fact in each case the Court laid stress on the statutory language of Title VII forbidding discrimination to "individuals." But as Justice Powell, dissenting, pointed out, all insurance is based on averages. 23/ No individual as such is harmed by being made a member of a class on which the average is based. There is harm only if the class as a whole is one which the law will not permit to be established. In both the Los Angeles and Arizona cases, it is the whole class which as a class possesses a unique, gender-based characteristic -- longevity. It is this class constituted by a unique physical characteristic which fails the "but for" test of legality. As the class is unlawfully constituted, so every individual within the class who is harmed has a basis for objection. The same would hold of a class constituted by reproductive capacity.

It might still be argued that longevity as a physical characteristic is different from the capacity to bear children. Not every woman, it might be said, is long-lived, but every woman, qua woman, is capable of reproduction. Such an argument, it is obvious, appeals to fiction not fact. A substantial number of women are incapable of having children. The physical characteristic is true of the majority, as longevity is true of the majority, not of every individual. If classification by longevity is unlawful when the class is determined by sex, so is classification by reproductive capability.

We do not have to speculate about what the present Supreme Court thinks about the "but for" test applied to the reproductive capacity of women. In the same 1983 Term in which it decided the Arizona annuity case, the Court decided Newport News Shipbuilding and Dry Dock Co. v. Equal Employment Opportunity Commission. The issue was whether a disability plan which gave medical disability benefits to employees and their spouses was violative of Title VII because the plan covered the medical expenses of the spouses of female employees but omitted to cover the medical expenses for pregnancy of the spouses of male employees. The Court held the plan illegal. In form, the discrimination was against the male employees -- they did not get the same coverage for their wives that female employees got for their husbands. In substance, the basis of the discrimination was the unique physical characteristic of women -- only women could have a baby; only the medical treatment which childbearing required was denied coverage. 24/

Writing for the Court, Justice Stevens rejected the test the Court had used in 1976 when in General Electric Co. v. Gilbert it upheld G.E.'s exclusions of pregnancy from its disability plan. 25/ Then the Court had thought it enough to say that the company did not intend an invidious discrimination. Gilbert had been overridden by Congress enacting the Pregnancy Discrimination Act, but that act appeared to relate only to the pregnancy disability of female employees. In fact, in an exchange on the Senate Floor, Senator Williams, the bill's sponsor, had so assured Senator Hatch. 26/ Going beyond Congress' reversal of Gilbert, the Court found that the reasoning of that case had also been repudiated. Gilbert, Justice Stevens explained, had "concluded that an otherwise inclusive plan that singled out pregnancy-related benefits for exclusions was nondiscriminatory on its face, because only women can become pregnant." 27/ Now the Court, following the line indicated by Congress, but going further, held that the plan discriminated because of "sex." The Court repeated, endorsed and applied what was again called "the simple test" of "but for." 28/

It is widely recognized that Title VII sex discrimination cases are valuable precedent for knowing how the ERA will work: as Mary Dunlap put it, in these cases "the past is prologue" to the ERA. 29/ It is also widely recognized that "but for" is a test not only of simplicity but power. In the field of torts if "but for" is used as a test for causation, "there is no place to stop." 30/ Analogously, there is no place to stop when "but for" is made the test of sex discrimination. The Supreme Court in the "but for" Title VII cases has adopted a test that eliminates even such exceptions as Brown-Freedman once imagined to be compatible with the ERA.

A "but for" standard virtually makes certain that any time a person is denied a right because of a physical characteristic unique to his or her sex, Title VII is violated. Distinctions based on unique gender characteristics become paradigm cases of unlawful discrimination. "But for" what is uniquely female or uniquely male, the person would be getting the same benefits as those of the opposite sex. What is true under the language of Title VII ("because of" sex and "on the basis of" sex), we have every reason to believe would be true under the parallel words of the ERA, "on account of sex." Strikingly, Congress has found it necessary to write into the law where "because of" sex and "on the basis of" sex are defined a specific exception stating that these definitions do not require an employer to pay for non-life endangering abortions. 31/ Without the statutory exception, elective abortion would be included. The ERA has no similar exception. Discrimination focusing on a unique feminine characteristic would be a paradigm case of unconstitutional discrimination.

It may be objected that the Court did not adopt this approach in interpreting the Equal Protection Clause in the cases involving a state's refusal to fund elective abortions -- *Maher v. Roe* in 1977 and *Williams v. Zbaraz* in 1980; and that similarly the Court avoided this approach in interpreting the equal protection component of the Fifth Amendment in *Harris v.*

McRae, the federal abortion funding case. It has indeed been objected that the Abortion Funding Cases show that the Court still approaches abortion funding as a question relating to privacy and "summarily" dismiosses the equal protection argument. The conclusion has been drawn that, as long as the privacy rationale for Roe v. Wade dominates the Court's approach, the ERA will have an insignificant effect on abortion funding or abortion rights generally. 32/

These objections and this conclusion result from attempting to answer the question, "What is the effect of the ERA?" and then assuming, contrary to the basis of the question, that the ERA is not in effect. Of course, as long as there is no ERA, abortion supporters and the Court will depend on the privacy rationale. But let it be enacted, how the situation would be changed!

Contrary to the objections, the Court in fact took very seriously the equal protection arguments the pro-abortion advocates were able to muster in Maher, Williams, and McRae. In Maher four pages are devoted by the Court to the equal protection claims; in Harris (which was also dispositive of Williams) five pages. 33/ This is scarcely summary consideration. But the equal protection provisions of the Constitution do not use the language of Title VII or the ERA. There is no language in them referring to discrimination "because of sex," "on the basis of sex," or "on account of sex." The Court was not prepared to bring its new Title VII approach to bear on the constitutional provisions on equal protection. Consequently what the Court did in interpreting two parts of the Constitution lacking the language of the ERA has little if any precedential value for interpeting the ERA itself. If the Equal Protection Clause were adequate for the objectives sought by the proponents of the ERA, there would be no need of the ERA. It is the new language of the ERA that is crucial. As to the meaning of that language the recent Title VII cases are clear precedent.

In the light of these cases -- Los Angeles Water, Arizona Governing Committee, Newport News Shipbuilding -- we do have helpful guidance as to how the present Supreme Court would apply the ERA, if enacted, to legislation related to abortion:

1. If a state funded medical operations but did not fund abortions, would a woman seeking an abortion be denied a right to medical treatment which, but for her sex, she could have? By the simple "but for" test, the Court's answer would be a clear Yes.

2. If a statute permited a doctor, nurse, or hospital to refuse to participate in an abortion on the ground of religious objection to the procedure, would a woman seeking an abortion be denied a right to medical treatment that, but for her sex, she would have. By the same Simple test, the Court's answer would be Yes. Reliance by the doctor, nurse or hospital on the exempting statute would constitute state action, bringing the ERA into play. The further question would then be presented whether First Amendment freedom of religious exercise would prevail over the right conferred by the new constitutional amendment we have hypothesized as adopted. It seems probable that the new amendment would control. On this point the 1983 case of Bob Jones University v. United States is enlightening: here, governmental policy, carrying out a constitutional principle of nondiscrimination on account of race, outweighed religious liberty. 34/ It is likely that discrimination "on account of sex" under the ERA would be treated as discrimination on account of race is now treated under the Fourteenth Amendment.

3. If a college or even a school with a religious commitment enforced a policy denying abortion to its students or disciplining students who had abortions or expelling

students who espoused, promoted and advocated abortion, it would under the ERA be under grave danger of losing its tax exemption. As Bob Jones University made clear, a charity ceases to be a public charity if it adopts disciplinary rules "at odds with the common community conscience" as that conscience is construed by the Supreme Court interpreting the Constitution. 35/ Under the ERA and the "but for" test, any singling out of abortion in disciplinary measures or choice of students would be contrary to public policy. As religious commitment was subordinated to public policy in Bob Jones University, so it could be subordinated here in finding the committed schools and colleges to be no longer tax exempt and gifts to them no longer deductible as charitable contributions. It would be open to individual taxpayers to challenge the tax exemption of discriminating institutions as black taxpayers successfully challenged an exemption for certain discriminatory schools in Mississippi. 36/ At a minimum the committed schools and colleges would face prolonged and dangerous litigation; at a maximum they would be stripped of their charitable status.

4. Could the state still require notice to a parent of their immature daughter's intention to have an abortion? Could the state still require parental or judicial consent to the abortion of a minor? Could the state still require a second physician in late term abortions? 37/ By the simple "but for" test, a notice requirement, a "substitute consent" requirement and a second physician requirement would all be equally invalid. If a woman asked for an abortion at any time during pregnancy, could a state constitutionally deny her access to the medical treatment she sought. By the simple "but for" test she would be, if denied, denied because of her unique physical capacity as a woman to have an abortion. The law preventing such

abortion would, under the ERA, be held constitutionally invalid if the "but for" criterion were used, with the possible exception of two situations set out in (5).

5. If a statute recognized a husband's right to consent to an abortion, it could, under the ERA, be upheld. To deny a husband the right to participate in the deicsion to kill a child he has participated in conceiving would, arguably, be to deny him a right on account of his sex. The Court would be faced with a choice between denying a woman a right to medical treatment on account of her sex or a man a right to participate in the abortion decision on account of his sex. Given the present Court's preferential treatment of the abortion right, it would probable decide in favor of the woman.

   Suppose, however, a statute were enacted prohibiting abortion as a means of sex selection. If a strong demonstration was made of what is widely believed to be the case -- that some abortions reflect a sex preference in favor of male babies and against girl babies -- the Court could uphold the constitutionality of the statute. The Court would have to choose between discrimination "on account of sex" in the womb and discrimination on "account of sex" in supplying medical treatment. The argument that "but for" their being girls the girl babies would not be killed should have a strong reception under the ERA.

The preceding questions have dealt with the impact of the ERA on the assumption that Roe v. Wade remained the law. Suppose that the present Supreme Court heeded the contentions of numerous authorities on constitutional law that the Court-inverted right of privacy has been stretched beyond reasonable limits in invalidating the laws regulating abortion. Suppose that the Court abandoned the privacy rationale of Roe v. Wade. Already in Akron Justice Powell has declared that Justice O'Connor's dissenting opinion "rejects the basic premise of Roe and its progeny." 38/ Already the Harvard Law Review says that, in Akron itself, the Court "subtly evades women's abortion rights even as it purports to affirm them." 39/ Suppose the Court recognized its error, and, as it has on numerous past occasions, decided to correct its interpretation of the Constitution. Would its path be blocked by an enacted ERA? Clearly, yes, by the "but for" test.

With the ERA in place, and "but for" the criterion, any statute regulating abortion, with the two possible exceptions just discussed, would be unconstitutional. When a woman is denied medical treatment of her reproductive system because it is a reproductive system, the discrimination is because she is a woman with a unique physical feature, but for which she would be treated. In Justice Stevens' words, "Sex is precisely what it [the discrimination] is based on. 40/ With "but for" the test, the ERA unless overridden by another express constitutional amendment would lock the abortion liberty into the Constitution.

The Dilemma of Proponents of the ERA

The proponents of the ERA in formal testimony before the Congress have been remarkably reticent in speaking of the relation between the ERA and abortion. The famous Brown-Freedman article, which was so informative about the many criminal laws which the ERA would invalidate, was silent about abortion. Application of the privacy doctrine to abortion had not yet been attempted by the Supreme Court. The ERA was either applicable or it was not applicable to the criminal statutes regulating abortion. Brown-Freedman said nothing. Was the silence the result of confusion or of doubt or of prudence?

Senator Bayh's Report for the Judiciary Committee also said nothing. Roe v. Wade was still undecided; Senator Bayh was later to be a strong defender of the abortion liberty. Did Senator Bayh have no views, one way of the other, on how the ERA would affect abortion law?

One prominent proponent of the ERA, Professor Thomas I. Emerson, has abandoned this coyness and described the ERA-abortion connection as "pure red herring." 41/ But he has not shown why either by his own test or by that of the Court interpreting Title VII there is not a close connection. The contrary opinion that the ERA would decisively affect abortion law has been authoritatively stated by the chairman of this committee, Senator Orrin Hatch; by Senator Sam Ervin; and by Rex E. Lee, the present Solicitor General of the United States. 42/ The red herring is really Roe and its primary rationale which the ERA would effectively supersede and surpass.

With so much legislative history and such clear Supreme Court precedents to the contrary, it is difficult to believe that any informed proponents of the ERA can now maintain that abortion is a red herring when the effects of the ERA are considered. If the proponents do not want the ERA to be affected by the abortion controversy they have an easy option: to agree to an amendment of the ERA specifying explicitly that nothing in the ERA confers a right to abortion or the funding of abortion. They appear to be unwilling to agree to such an amendment.

The dilemma that the proponents of the ERA face is this: If they acknowledge that the ERA will have an enormous impact on abortion legislation, abortion litigation, and schools, colleges, and hospitals opposed to abortion, they will lose crucial votes in the Congress and in the state legislatures. They will be in effect sponsoring an amendment rejected by the seventy per cent of the country that rejects abortion on demand. 43/ But if they disclaim any effect of the ERA on abortion they will abandon the legislative history of the amendment and the Supreme Court's interpretation of Title VII. They will also offend, perhaps mortally, that small, unrepresentative but militant band which rejoices that ERA means Equal Rights for Abortion.

NOTES

1. Committee on the Judiciary, "Equal Rights for Men and Women," Senate Report No. 92-689, 92nd Cong., 2d Sess. (1972) pp. 11-12.

2. See Brief Amici Curiae of the Women's Law Project and the American Civil Liberties Union, December 23, 1975 in General Electric Compnay v. Gilbert, United States Supreme Court, Docket No. 74-1589, [hereafter Women's Law Project Brief] p. 14 (on the use of the article in Congress); Minority Views of Mr. Ervin in Senate Report No. 92-689, p. 36 (Senator Bayh's tribute).

3. Barbara A. Brown, Gail Falk, Thomas I. Emerson, and Ann Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 Yale L. J. 871 (1971) at 893.

4. Ibid. at 894.

5. Ibid. at 894.

6. Senate Committee Report at 12.

7. Brown-Freedman, "The Equal Rights Amendment" at 964.

8. Ibid. at 957.

9. Ibid. at 955, note 205.

10. Ibid. at 956. The Senate Report authored by Senator Bayh says broadly at p. 12 that "rape" could still be a crime but fails to take up the examples given by Brown-Freedman. Elsewhere the Report at p. 16 suggests that statutes void for being "under-inclusive" under ERA could be amended by the courts. Clearly no court has the power to amend a criminal statute to embrace a new class. The courts would simply have to declare the laws unconstitutional.

11. Women's Law Project Brief 1, 2.

12. Ibid. 16-19.

13. Note such respectable federal judges as Frank Coffin of the First Circuit Court of Appeals comparing the termination of childbearing capacity by sterilization to "excisions of benign tumors which could cause subsequent neurological problems," Hathaway v. Worcester City Hospital 475 F.2d 701 (1st Cir. 1973) at 705; Judge Jon O. Newman of the Second Circuit declaring Roe v. Wade conveyed the teaching that basically abortion and childbirth "are simply two alternative medical methods of dealing with pregnancy," Roe v. Norton 408 F. Supp. 660 (D. Conn. 1975) at 663, n. 3; and Judge Clement Haynsworth of the Fourth Circuit reading Roe to mean that "the fetus in the womb is neither alive nor a person," Floyd v. Anders 440 F. Supp. 535 (D. So. Car. 1977) at 539.

14. General Electric Co. v. Gilbert 429 U.S. 125 (1976) at 152 (dissenting opinion). Justice Brennan's examples are particularly appropriate because his approach "illustrates the approach contemplated by the ERA," Ann E. Freedman, Statement Concerning H.J. Res. 1, November 3, 1983, before the Subcommittee on Civil and Constitutional Rights of the

House Judiciary Committee. Freedman's comments relate to Justice Brennan's position in *Geduldig v. Aiello* 417 U.S. 484 (1974), a position which he carried over into *Gilbert* and that has now become the position of the Court, see *infra* at notes 24-25.

15. *Hawaii Right to Life, Inc. v. Chang, Director of Department of Social Services and Housing*, Civ. No. 53656, Hawaii First Circuit Court, 1978, cited in Karen J. Lewis, "A Legal Analysis of the Potential Impact of the Proposed Equal Rights Amendment (ERA) on the Right to an Abortion or the Funding of an Abortion." (Congressional Research Service, October 20, 1983) p. 10.

16. Complaint, *Moe v. King*, Supreme Judicial Court of Massachusetts, Civil No. 80-286, filed July 9, 1980, cited in Lincoln C. Oliphant, "ERA and the Abortion Connection," 7 *Human Life Review* (Spring 1981) 43.

17. *Joanne Fischer et al. v. Department of Public Welfare*, Commonwealth Court of Pennsylvania, No. 283 C.D. 1981, filed December 15, 198, p. 24 (unpublished).

18. Ruth Bader Ginsburg, "Sex Equality and the Constitution" (the 1978 George Abel Dreyfous Lecture at Tulane University), 52 *Tulane Law Review* 451 (1978) at 462. The difference should be noted between this approach and Kenneth M. Davidson, Ruth Bader Ginsburg and Herma Hill Kay, *Text, Cases and Materials on Sex-Based Discrimination* (St. Paul: West Publishing Co., 1974) 108 where "physical characteristics unique to one sex" are seen as an exception to the ERA.

19. *Los Angeles Department of Water and Power v. Manhart* 435 U.S. 702 (1978).

20. *Ibid*. at 713.

21. *Ibid*. at 711.

22. *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 103 S. Ct. 3492 (1983) at 3498.

23. *Ibid*. at 3509 (dissenting opinion).

24. *Newport News Shipbuilding and Dry Dock Company v. EEOC* 103 S. Ct. 2622 (1983).

25. *Ibid*. at 2628.

26. 123 *Cong. Rec.* S 15,038-39 (September 16, 1977), also quoted by Justice Rehnquist in *ibid*. at 2635-2636 (dissenting opinion).

27. *Ibid*. at 2631.

28. *Ibid*. at 2630-2631.

29. Mary C. Dunlap, "The Equal Rights Amendment and the Courts," 3 *Pepperdine Law Review* 42 at 63 (1975), a study commissioned by the Equal Rights Amendment Project, California Commission on the Status of Women.

30. *Prosser on Torts* (4th ed., 1971) 239.

31. 42 *U.S. Code* sec. 2000e(k).

32. Ann E. Freedman to Congressman Don Edwards, Chairman, Subcommittee on Civil and Constitutional Rights, House Judiciary Committee, November 7, 1983.

33. *Maher v. Roe* 432 U.S. 464 (1977); *Harris v. McRae* 448 U.S. 297 (1980); cf. *Williams v. Zbaraz* 448 U.S. 358 (1980).

34. *Bob Jones University v. United States* 103 S. Ct. 2017 (1983).

35. *Ibid*. at 2029.

36. *Green v. Kennedy* 309 F. Supp. 1127 (D. D.C.) *app. dismissed sub nom. Cannon v. Green* 398 U.S. 956 (1970).

37. See *Planned Parenthood of Missouri v. Ashcroft* 103 S. Ct. 2517 (1983) (second physician and substitute consent requirements upheld); *H.L. v. Matheson* 450 U.S. 398, 406 (1981) (notice to parent for immature minor upheld).

38. *City of Akron v. Akron Center for Reproductive Health* 103 S. Ct. 2481 (1983) at 2487, n. 1.

39. "The Supreme Court, 1982 Term," 97 *Harv. L. Rev.* 1 (1983) at 86.

40. *Supra* at n. 21.

41. Thomas I. Emerson, "Statement on Proposed Resolution to Rescind Connecticut's Ratification of the Equal Rights Amendment," *Hearings on S.J. Res. 134 before the Sub-Committee on the Constitution of the Senate Judiciary Committee*, 95th Cong., 2nd Sess. (1978) at 138.

42. Orrin G. Hatch, *The Equal Rights Amendment. Myths and Realities* (Savant Press, 1983) 48; Sam Ervin to the Eagle Forum, September 22, 1975, quoted in *ibid*. 48; Rex E. Lee, *A Lawyer Looks at the Equal Rights Amendment* (Provo: Brigham Young University Press, 1980) 128 n. 27.

43. See John T. Noonan, Jr., *A Private Choice* (New York: The Free Press, 1979) 73-74.

WRITTEN QUESTIONS FROM SENATOR THURMOND TO PROF. JOHN T. NOONAN, WITH SUBSEQUENT RESPONSES

Question No. 1. Professor, it has been stated that the passage of the Equal Rights Amendment necessarily entails the question of who is going to have control over issues based upon gender. This is basically a question of Federalism and which level of government it is going to have control over the practice of abortion. I voted in favor of Senate Joint Resolution 3, the abortion amendment, in order to have authority over this matter returned to the States. Is it not the case that a vote in favor of the ERA is in effect a vote against the concept of a true Federal relationship between the States and the National government at least insofar as the matter of abortion is concerned?

Answer. A vote in favor of the ERA is a vote to federalize abortion, because, if enacted, the ERA will provide a basis for the Supreme Court to continue and to extend its control over abortion. The ERA is destructive of state authority in this matter.

Question No. 2. In your study of the proposed ERA you concluded that ratification of the amendment would probably lead to the invalidation of State statutes providing that doctors and nurses may legally object to the performance of abortions—the so-called "conscience clauses." In your view, is there any way that the Congress can approve the ERA and at the same time insure the continuance of this type of legislative right to object to participation in the practice of abortion?

Answer. There is no practical way in which Congress could continue to ensure the continuance of "conscience clause" legislation on abortion, if the ERA were enacted. Clauses of this kind would constitute "state action." As the ERA equates sex with race, state action discriminating on account of sex would be unconstitutional. It is highly probable that the Supreme Court would hold discrimination against abortion to be discrimination on account of sex, and it is probable that the Court would hold that the new constitutional right outweighed religious liberty. It would be entirely in the judgment of the Court as to what right should prevail. Congress could do nothing.

Question No. 3. You have heard it stated that it is unlikely that the Supreme Court would switch its basis for the right to an abortion from the right to privacy to the Equal Rights Amendment. Would you not agree that if the Supreme Court had more explicit constitutional language upon which to ground the abortion right, such as in an amendment, that it is very likely that the court would utilize that wording rather than continue to rely upon such a translucent right as the court-created right to privacy?

Answer. If the ERA were in place, the Court would have a basis on which to base the abortion right. The Court's reliance on the Court-created doctrine of privacy has been very much criticized. It is very likely that the Court would rely on the new amendment rather than on the criticized doctrine it now uses.

Question No. 4. In a few States having state Equal Rights Amendments, challenges have been brought to restrictions on government funding of abortion. These challenges have been based upon these individual State amendments. Professor Noonan, is it logical to look at these instances of litigation as forming a "track record" that may be applicable to a national ERA?

Answer. It is clear that the challenges brought to government restrictions on the funding of abortion in the States with ERAs in place are a good indication of what would happen if the federal ERA was enacted. It is clear that the pro-abortion groups believe that the ERA will provide a serious basis for challenging the Hyde Amendment and state restrictions on abortion. It is plain that the challenge would be upheld by the Supreme Court with the ERA in place, if the Court follows the precedents it has already set in such Title VII cases as *Newport News Shipbuilding.*

Question No. 5. How valid are prognostications of what the Supreme Court will do with the issues of a right to abortion and abortion funding which are based upon past decisions rendered without an ERA? Is it really possible to accurately predict how the Court will act with such a broad amendment as a part of the Constitution?

Answer. Predictions as to what the Court will do based on past decisions where the ERA did not exist are unrealistic. The Court obviously interprets the Constitution in existence. The precedents from which we can understand what the Court will do with the ERA are the Title VII sex discrimination cases which the ERA proponents admit are good precedents for understanding the ERA.

Question No. 6. With the ratification of the ERA it is a virtual certainty that sex would become a suspect classification subject to strict judicial scrutiny. Would you not agree that if a question involving the Hyde Amendment were presented to the

Court for decision that it would invalidate such a restriction on abortion funding on the basis of a denial of equal protection of the laws?

Answer. If the Court follows its Title VII sex discrimination analyses under the ERA it would invalidate the Hyde Amendment as a denial of a woman's rights "on account of sex."

Senator HATCH. Let me begin. These are difficult questions and I hope that both of you can answer them as directly and succinctly as you can. I will start with you, Ms. Freedman, and then I will ask Mr. Noonan to comment. Either of you can rebut the other. One of the reasons we are holding these hearings is to get the best possible legal analysis of these matters from all perspectives.

The issue of the ERA-abortion relationship has been, as we have seen here this morning, one of the most controversial issues involved in the ERA debate.

There has been a great deal of contradictory evidence on this matter so my threshold question to both of you witnesses concerns where the burden ought to be placed. What are the standards that this committee ought to employ in determining whether or not there is a problem here? Where does a responsible legislative body place the burden of proof to establish and clarify what the equal rights amendment really means?

Let us start with you, Ms. Freedman. Who has the burden of proof on this issue of whether or not the ERA is going to result in mandatory Federal funding of abortion or the other policies that Mr. Noonan has been discussing here this morning?

Professor FREEDMAN. Well, it is odd to talk about burden of proof as if the choice were outside of Congress. The Senate and the House of Representatives control the meaning——

Senator HATCH. Let us talk in terms of speaking to Congress. Who has the burden of proof?

Professor FREEDMAN. Let me explain. The legislative history of a constitutional amendment is the firmest guide to its meaning. The power over the legislative history is a power possessed by the Senate and the Congress.

The Congress is free to adopt whatever reports and whatever statements it wishes to adopt to give meaning to those words. Now, obviously, if the words of the amendment said abortion is now a constitutional right, regardless of any decisions heretofore to the contrary or whatever, there is a limit to how far Congress could go in changing that meaning. But that is not what the ERA says.

It does not seem to me there is any question of burden of proof as if it were a legal argument in a court because the Congress plays a different role than a judiciary. You are not deciding a case with a plaintiff and a defendant. You are the legislators.

So my point would be that the legislative history that you in the Senate and the Congress craft—you are in total control of it and it is not a question of anybody outside——

Senator HATCH. Who effectively has to carry the burden of proof to undecided members on this issue? There are still a number of them. Do you not believe that those who are proponents of the amendment have the burden of proof to show what it means?

Professor FREEDMAN. Yes, and what the proponents say it means will be the most powerful legislative history, where the amendment is adopted. In other words, if the amendment is adopted, it is what the proponents say it means and what the majority reports or any reports supporting the adoption of the amendment in either House say. And if they are clear about what the amendment means, that will be controlling.

Senator HATCH. Even though it may be in contradiction with existing legal trends that Mr. Noonan has been talking about?

Professor FREEDMAN. Well, he is making various predictions about what the Supreme Court will do, not based on the ERA's legislative history.

Senator HATCH. He is basing it on actual case law that exists, legal decisions that exist.

Professor FREEDMAN. Right, but if Congress says this is what this amendment means, that, as a matter of constitutional law, in my understanding, controls, period. If Congress says we do not agree that this conclusion should be drawn from such and such a court case, it is improper for a court to draw such a conclusion.

Senator HATCH. But do you agree that for undecided Senators the proponents must bear the burden of proof to show what this means?

Senator METZENBAUM. Mr. Chairman, let me ask you a question. Tell me, on what other legislative issue that we have had before us—and you and I have served in the Senate the same number of years—have we gone to the question of who has the burden of proof. I have never heard that raised.

Senator HATCH. Now, Senator, you do not sit on the Subcommittee on the Constitution, but in seeking to amend the Constitution of the United States I have always argued that the proponents have had the burden of proof.

On the balanced budget amendment, as the principal proponent I carried the burden of proof. On electoral college reform, my legislative adversaries carried it.

We are not talking about a simple statute that you wave in the wind. We are talking about the basic, organic law of this land. When you talk about that, it seems to me the proponents have the strong burden of proof.

Senator DECONCINI. But, Mr. Chairman, I do not think we are talking about burden of proof in a court case.

Senator HATCH. Well, it is not a matter of law; I agree with that.

Senator DECONCINI. Yes, and that is important. The Senator from Ohio has a point. We are not talking about a burden of proof that we have to carry in a court of law.

Senator HATCH. Well, in that sense, this is not a court of law, but every time we start asking what the ERA means, we get a lot of fuzzy answers from proponents. We have been told that the courts will have to decide the tough questions. That has been the history of these hearings. Mr. Noonan, could you comment on that?

Professor NOONAN. Yes, Senator. I did comment in my written testimony on how puzzled I was at that original Freedman-Emerson article that went through all the criminal laws of the United States, some I never even heard of, with meticulous attention, telling us which ones would be unconstitutional and quoting laws against some forms of rape, the White Slave Traffic Act, et cetera. I was just amazed at the laws that would be unconstitutional under the ERA, but here was abortion, which was so clearly a women's right, that was never mentioned. I could not help thinking that they must have thought about it. I could not imagine that those astute minds were unaware that a lot of people thought abortion should be a constitutional right. I knew it was not at the time. Why were they silent?

Now, I have not heard anything this morning that is a forthright repudiation of the abortion problem. Professor Freedman is in an excellent position to tell you that this has nothing to do with abortion; it is not meant to affect abortion; it will not affect abortion. She could tell you that and help make the legislative history. She has not told you. She has just told you what the Court did in a few other, old cases.

Professor FREEDMAN. First of all, I would like to take this opportunity to say something about that Yale article. All of the examples that you just mentioned, Professor Noonan, having to do with the criminal laws have to do with facial sex classifications; that is, classifications which say—for example, in the rape laws it says in many States that only a man can be the perpetrator and only a woman can be the victim.

It is a facial sex classification. It does not say something about a unique physical characteristic on the face of the law. It says men are the only people who can commit this crime and women are the only people who can be victims of this crime.

We went through all of the facial sex classifications we could think of, trying not to be repetitive of every minor variation, and talked about how it would be practical to get rid of facial sex classifications because at that time people took it as commonplace that you had to have sex-based classifications in the law. Now, most people do not think that anymore, but they used to think that.

Now, unique physical characteristics classifications—those which relate to pregnancy, for example—are not facial sex classifications. It is clear in the legislative history throughout the whole development that they are different from facial sex classifications and there is a different standard.

So, when we talked about facial sex classifications, we tried to talk relatively exhaustively. We saw the unique physical characteristics doctrine as a subsidiary principle and it has a different standard of review.

Senator HATCH. But you went far beyond facial classifications. You brought in the issue, for example, of whether testing in the military would exclude more women than men. How does that involve a facial classification?

Professor FREEDMAN. I did not say we did not talk about it, Senator. I did not say we did not talk about it.

Senator HATCH. OK.

Professor FREEDMAN. I am saying the primary emphasis—and we were most exhaustive about facial sex classifications and we were quite clear, and are still clear, that there is a different standard for facial sex classifications than for either neutral rules with a disparate impact or for unique physical characteristics classifications.

We do not say classifications based on unique physical characteristics are the same as facial sex classifications. We do not adopt, and the legislative history has never adopted, the "but for" test that Professor Noonan speaks about. Unique physical characteristics classifications are different.

Senator **Hatch**. Do you agree that the Supreme Court has adopted that test?

Professor **Freedman**. No, I do not.

Professor **Noonan**. In title VII?

Professor **Freedman**. No, I do not.

Professor **Noonan**. Have you read the case?

Professor **Freedman**. Yes, I have, and I would be delighted to discuss the *Newport News* case because I think you have missed a key step. In the *Newport News* case, the Court says there is a two-step analysis. The first step is an adoption of the dissenters' position in *Gilbert*.

They say Congress, by adopting the Pregnancy Discrimination Act, adopted the dissent in *Gilbert*, and I think that was the appropriate thing for the Justices to do. They say the second step is the "but for" test, which they do not apply to the woman's right. They say "but for" the man's sex, he would not be married to a woman and she would not suffer that exclusion.

They do not say that the test for unique physical characteristics themselves is a "but for" test. So they themselves maintain a distinction which you have combined into one.

It is one thing to say unique physical characteristics are subject to strict scrutiny, which is what was said in *Geduldig* by the dissenters and in *Gilbert*, and which Congress adopted. It is another thing to say a "but for" test, which is the test that applies to facial sex classifications. The Court maintained the distinction between the two in *Newport News*. That distinction is part of the legislative history of the ERA.

We know what strict scrutiny as applied to abortion, means because that is what the Supreme Court does in the cases following *Roe*. So it is incorrect to try to mix the two parts together. I am not suggesting you do this in a bad-intentioned way, but reading that opinion, they say it is two steps and the first step is *Gilbert* and *Geduldig* and the second step is a "but for" test applied to the male sex. So you are drawing a false analogy there, in my opinion.

Senator **Hatch**. Professor Noonan?

Professor **Noonan**. I do not think there is any analogy to be drawn. I will be glad to read the language of the majority, which gives as a hypothetical: "Suppose a private employer were to provide complete health insurance coverage for the dependants of its female employees and no coverage at all for the dependants of its male employees. It would violate title VII. Such a practice would not pass the simple test of title VII discrimination that we enunciated in *Los Angeles Department of Water* v. *Manhart*, for it would treat a male employee with dependants in a manner which, but for that person's sex, would be different."

That is the test under title VII, and I really, Professor Freedman, would have to say in all honesty that you seem to be stuck with those earlier opinions of the 1970's. You do not realize you have won; the majority agrees with you. You have got a test that is even stronger than perhaps you would like, but it is in place there under title VII.

Professor **Freedman**. Professor Noonan, the language you just read refers to discrimination against the male employee, but for his sex. That is the second step. They are saying that the case involves a facial sex classification discriminating against male employees.

Manhart is a facial sex classification case; *Newport News*, in the second step, is a facial classification. That is different from the unique physical characteristics test which calls for strict scrutiny.

Professor **Noonan**. Well, Mr. Chairman, maybe I should just state the essential facts of *Newport News*. The company, obedient to the Pregnancy Discrimination Act amendment, gave its female employees coverage for their pregnancies as part of its comprehensive medical plan.

They made one exception, and that exception was for the wives of their male employees. So the EEOC came into court saying, look, this is sex discrimination; you are covering all medical operations——

Senator **Hatch**. Are you saying that whether it applies to the male or the female, it is sex discrimination?

Professor **Noonan**. That is right.

Senator **Hatch**. How can you have it one way or the other if ERA passes?

Professor **Noonan**. It happened to involve men and it was not facial. It was because the wives of the men were not getting coverage; the nonemployee wives were not covered.

You know, Mr. Chairman, you may have seen that the dissent in this case quoted an exchange that you had with Senator Williams when the bill was going through. You asked Senator Williams, is this covering——

Senator **Hatch**. Talk about judicial regard for legislative history.

Professor **Noonan** [continuing]. Is this covering the wives of employees? He said no. The Court said, "Congress has repudiated our reasoning, so now we will take the reasoning of the dissenters and we will go a little bit further," a little further than Professor Freedman really likes, and have this very simple test.

"But for" is an awfully simple and powerful test. I have suggested in my written testimony that it has a great history in the field of torts, in the "but for" causation field. And it would seem to be an enormously powerful test; you can cast so many things, as but for this, would the accident have happened? No, it would not; therefore, there is causation.

It is an extraordinary test to move into the title VII sex discrimination area, but there it is and we have got to face it.

Professor **Freedman**. Professor Noonan, there is another problem I have with your big emphasis on *Newport News*. As I have said, I do not agree with your interpretation of the case and I just urge the Senators to read it and see which of us is correct. I do not think we can settle it here.

Senator **Hatch**. Let us do that.

Professor **Freedman**. I want to respond to something else about relevant precedents.

Senator **Hatch**. Let me make one comment while it is on my mind. You can say that four Justices have agreed with exactly what he has said the ERA would do.

Professor **Freedman**. You are saying in *Newport News*, Senator?

Senator HATCH. Yes

Professor FREEDMAN. You can only say they have agreed with it if he is correct about what the *Newport News* majority says.

Senator HATCH. I see.

Professor FREEDMAN. But I want to point out that Professor Noonan is putting all this emphasis on a title VII case and he is not placing emphasis on *Harris* v. *McRae* in this instance.

Senator HATCH. I hope to discuss that shortly.

Professor FREEDMAN. Well, I just want to make the point right here in this connection because, supposing it were true that the courts—I think Congress adopted the *Geduldig* dissent; and that is what the Court says in the majority in *Newport News*. They adopted the *Geduldig* dissent.

The *Geduldig* dissent is a strict scrutiny standard. It does not say it is a facial sex classification. It does not say classification based on unique physicial characteristics are absolutely prohibited. It says they have to be justified.

But if Congress were to adopt the "but for" test under title VII and if this Congress, in its interpretation of ERA, said, "We do not mean a 'but for' test for pregnancy; we mean strict scrutiny," that would control.

Senator HATCH. I am going to get into the strict scrutiny issue because I think either way, it may back what Mr. Noonan is saying.

Senator Metzenbaum tells me he has to go to another committee hearing and he has a few questions, so I want to defer to him.

Senator DeConcini, do you have questions here today, too?

Senator DECONCINI. I do. I do not know the time schedule of the Senator from Ohio. I guess we all are under time constraints.

Senator HATCH. Well, why do I not turn to the Senator from Ohio and then I will be happy to try and accommodate you.

Senator DECONCINI. I have some specific questions.

Senator HATCH. I have a great many questions.

Senator METZENBAUM. I want to ask two or three questions.

Senator DECONCINI. Well, why do you not go ahead? I will ask my questions after the Senator from Ohio.

Senator METZENBAUM. Professor Noonan, you have made the arguments as to the impact that the passage of ERA would have on five separate areas. Now, 16 States have equal rights provisions in their constitutions. Can you tell me of any court decision which would support any of the observations that you have made with respect to the impact that the passage of ERA would have?

Professor NOONAN. Obviously, Senator Metzenbaum, the State courts do not have on their books a doctrine like the *Bob Jones* doctrine. They do not have on their books a doctrine like *Newport News*.

The State courts are perfectly free to shape their own State constitutional decisions, but I do know that in four States of the Union, the American Civil Liberties Union has urged that the States be mandated to fund abortions on the basis of the State equal rights protection. That is their position and it has not been rejected by any court.

Senator METZENBAUM. But no court has supported any of the five observations that you have made?

Professor NOONAN. It is a different ball game in each State.

Senator METZENBAUM. Well, as a matter of fact, the question of tax exemption for a school would not be a different ball game. The question of the State's obligation to fund would not be a different ball game. The question of the conscience clause exemptions would not necessarily be a different ball game.

I guess I just have to say you say it is a different ball game, but again——

Professor NOONAN. It is a different ball game because you have got a different team; you have got judges of the State courts. I do not want to leave with you, Senator, the impression that I necessarily agree with the reasoning of a majority of the Supreme Court in *Newport News* or in *Bob Jones*. But I am saying they are our judges in the Federal system and they are the ones we look to.

The State courts have got a different system of jurisprudence, and so it is pretty irrelevant as to what they have decided when they do not have those precedents.

Senator METZENBAUM. But the State courts are guided, and you say it is irrelevant as to what the Supreme Court has said to date as pertains to State court decisions. That is, to me, quite an odd statement for a professor of law to be making. I am sure you did not mean that.

Professor NOONAN. Well, I would give them a little time. I say it is certainly irrelevant when they have not had those cases to digest. They are obviously new enough for some people here not to have digested them, and it is really going to take a while.

It is one of the famous cases of trickle down to have the Supreme Court decisions trickle down to the State judiciary, but wait and see.

Senator HATCH. I think that there are only six or seven States that have identical language to the ERA and all have been enacted relatively recently, so your point is well taken.

Senator METZENBAUM. Well, I understand that it may not be the identical language.

Senator HATCH. Most of them have quite a different language.

That is, of course, the issue here—language.

Senator METZENBAUM. Alaska, Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Pennsylvania, Texas, Utah, Virginia, Washington, and Wyoming all have equal rights——

Senator HATCH. Only a relatively small number have identical language; already there have been four major challenges in these States on this precise issue.

Professor NOONAN. Yes.

Senator METZENBAUM. But when you come before a Senate committee and say that these five results will occur, and say it flatly——

Senator HATCH. If you read his statement, he does not quite say that, but he does say they are likely to occur. I would suggest you read the statement.

Professor NOONAN. I quite agree, Senator, that anybody who predicts with absolute assurance what the Supreme Court of the United States is going to do is likely to be surprised. I deal with probabilities and precedents and I think it is on the basis of probabilities and precedents that these things will happen.

Senator **METZENBAUM**. Professor Freedman, you heard Professor Noonan's conclusions, which I can call his five conclusions as to the results of passage of ERA. Would you like to take a few minutes, because this is the last question I will ask, as to what your observations are with respect to his conclusions?

One, it would mandate funding of abortions by States and the Federal Government. Two, it would sweep away all present restrictions on abortions. Three, it would end conscience clause exemptions for doctors, nurses, and hospitals. Four, it would threaten the tax exemption of schools that do not support the concept of abortion, or their teachings are against abortion. Five, it would provide a new basis in the Constitution for abortion rights.

Now, you can address yourself to any or all of them, but it seems to me that you ought to be given an opportunity to give us the benefit of your thinking on the subject.

Professor **FREEDMAN**. Yes. I disagree with Professor Noonan on all five. On the first point about public funding, my position, I think, is made pretty clear in my testimony, which is that we already know what the Supreme Court will do when applying strict scrutiny. They applied strict scrutiny in *Harris*. They concluded that public funding did not fall under strict scrutiny, and I do not think the strict scrutiny mandated under the ERA would lead to any different result and I do not think they would switch to a new form of analysis.

On the restraints on abortion, it is the same position. I think privacy analysis will control. The ERA would mandate nothing more than strict scrutiny. We already have strict scrutiny and it will be the same results as now, plus I do not think the Court will switch to a new form of analysis.

On conscience clauses, there is some amplification. I do think privacy will continue to be the way they decide it, but I also think there are issues of the power of Congress in relationship to protecting conscientious objection under the freedom-of-exercise clause of the first amendment.

I think there would be serious problems, at least with some kinds of requirements that an individual participate in abortions who was conscientiously opposed. That would be similar to requiring somebody to go to war who was conscientiously opposed. And I do not think that there is any doubt that the Supreme Court would respect that as based on an independent constitutional provision.

I think privacy analysis would still control, but even if I was completely wrong and the ERA became the sole form of analysis, I think it would have to be construed in a manner consistent with the first amendment free-exercise clause.

The tax exemption one—I am really glad to be able to address that because I think it is based on a serious misreading of the *Bob Jones* opinion and a serious confusion between State action doctrine and tax exemption policy.

The Court in *Bob Jones* was interpreting the Internal Revenue Code and asking whether it was consistent with Congress' intent about the Internal Revenue Code that the executive branch had withheld a tax exemption from *Bob Jones*. So the way that the Constitution got into it was as a guide to the meaning of Congress in adopting a statute.

The Court said quite clearly that the Constitution did not require the result in *Bob Jones*. The result was because of its interpretation of what Congress intended to do about tax exemption.

Bob Jones does not say the 14th amendment requires the tax exemptions to be cut off. Therefore, if Congress wished to cut off tax exemptions, as Professor Noonan suggests in these cases, I think Congress would have the power now to do that because Congress has great control over tax exemption policy, although there might be first amendment problems even there.

But we are talking about, if Congress did not want tax exemptions to be removed, if Congress wanted the tax exemptions of private schools to stand, would the court say no; you must withhold tax exemptions? Does the Constitution, apart from Congress, require that? That is not what *Bob Jones* says.

State action is the doctrine of the independent effect of the Constitution on private institutions. Without any congressional action, what does the Constitution by its own force do?

The Court has, in recent years, cut that back to the point where the Government must not only have funded and be totally involved with the private action that is challenged, it must have ordered the discrimination that is complained of before the constitutional protections apply.

So it is very important to make a distinction between tax exemption policy, which *Bob Jones* says is in the control of Congress, and therefore in that case they interpret congressional intent, and State action doctrine which only applies to private institutions which are funded completely by the Federal Government or the State government and have been ordered to carry out the practice in question by the Government.

In fact, Professor Noonan recognizes that when he says the only recourse that these poor institutions would have is to Congress. That is right. Congress has the power to decide tax exemption policy, and in this instance when IRS had acted to interpret the tax exemption laws a certain way, Congress had gone along with it for many years and the inaction in the face of Executive action was given some consequence.

But if Congress is going to reach such a strange result as Professor Noonan hypothesizes, I for one just cannot imagine the scenario he talks about, and *Bob Jones* certainly does not compel it.

The last one is that the ERA would provide an independent basis for rights if for some reason the Supreme Court changed its mind about *Roe*. I disagree with that, also. The reason I disagree with it is because the scenario he is hypothesizing is one in which the Supreme Court Justices have changed their minds about the proper role of the community in relationship to a woman's decision about abortion.

Right now, a majority of the Supreme Court believes that it is within the woman's right to privacy and the community, through the Government, should not attempt to restrict her decision.

If the Court were to change its mind about that principle, it boggles the mind to think that having changed their minds, they would turn around and engraft onto the ERA the same result they had just rejected.

Why would the Justices go to the trouble of backing away from the privacy analysis in order to turn around and adopt it under the ERA?

The whole picture that Professor Noonan paints is a picture of the Court on its own figuring out what to do, apart from the intent of Congress and the American people; that the Court is the arbiter of the Constitution.

Then he treats the FRA as if, when Congress and the people are clear that the ERA should not do this, the Court is going to be compelled to do something the Court does not want to do. I mean, if the Court wants to use the constitutional right of privacy to reach abortion funding or anything else, they will do it. If they do not want to, they will not do it.

The idea that somehow they are going to step back in privacy and that the ERA is going to force them to go forward—those are two inconsistent views of the operation of the Supreme Court. In my opinion, if the Supreme Court is going to change its mind, it is going to change its view of privacy and it is hardly going to turn around and then rereverse itself under the ERA. It is silly to think that they would do that.

There are two ways that we would get rid of the right to privacy. One way is the Court changes its mind, and then you have to assume they change their mind in one context and then in the ERA context, they turn around and reinvent that same wheel. I do not see why the Court would do that.

Or there is a constitutional amendment, the human life amendment or some other amendment, which reverses *Roe* v. *Wade*. In that event, if there were two constitutional amendments, one about human life and one about the ERA, they would have to be construed consistent with each other, and again the Court would not have the power under the ERA to reinvent it because their decision would have to be consistent with both clauses. So I strongly disagree with that last conclusion.

Senator **METZENBAUM**. Thank you, Professor.

Now, for my very last question, Mr. Chairman, can you give me some assurance as to when the full committee will have an opportunity to vote on this constitutional amendment? We know the projection for this year's legislative calendar. We have had four hearings; I understand there is another one scheduled for February.

When will the full committee have an opportunity to vote on the ERA amendment?

Senator **HATCH**. I have made it clear that we will wait until the House acts on this, but I really cannot say when we will vote on the ERA. We are holding thorough hearings, and I think we are holding them expeditiously.

Senator **METZENBAUM**. Why should the Senate wait for the House?

Senator **HATCH**. The House is going to act first on this. When they act, then we will be happy to act, too, so nobody has any illusions about this.

Senator **METZENBAUM**. Well, let me say to the chairman that I believe that we are coequal with the other House.

Senator HATCH. That is true.

Senator METZENBAUM. We have coequal responsibilities, and when I have concluded that we have dragged our feet long enough—and I feel we are dragging our feet—I will offer a motion in the full committee. And I do not want to take the chairman by surprise because I want to cooperate with him, as he does with me.

But I do want you to know that I think that this Senator and other Senators would like to vote on the ERA constitutional amendment.

Senator HATCH. The Senator has the right to do that and, of course, I would uphold his right. But I certainly hope the Senator will not do that until we have had full and extensive hearings. If we were not proceeding with hearings, that would be another matter. Our next hearing is set for next month and it takes about a month between hearings to set them up.

This is not easy to do. As a matter of fact, we sometimes have not known who the proponents' witnesses were going to be until the last day. So all I can say is I am doing the best I can and I think anybody who observes these hearings and reads the transcripts has to admit these have been important hearings and they have been fair. Both sides have had equal time and have been treated fairly, I believe.

If the Senator wants to jump the gun and circumvent that process, that is his privilege to try, but I will certainly fight him on that if that is the case. I think it would be unfortunate.

I think this hearing today is very important. Both witnesses are excellent; both of them are well prepared. I think it points out again the wide disparity of belief with regard to what the equal rights amendment really means.

I might add that some of us still do not understand what it means——

Senator METZENBAUM. Do not feel bad about that, Mr. Chairman. We vote on things everyday out there on the floor of the Senate and we do not know what they mean. [Laughter.]

Senator HATCH. One of the reasons the country is in such a mess is because we are constantly voting on things we do not understand, do not care to understand, do not take the time to understand, and will not hold the hearings in order to understand.

That is what we are trying to avoid in this matter; we will proceed with dispatch, but we are going to do so on a responsible basis.

Senator METZENBAUM. I thank the chairman.

Senator HATCH. Senator DeConcini, I want to extend the time to you.

Senator DECONCINI. Mr. Chairman, thank you.

Senator HATCH. I have only asked one question, but I will try and defer my questions.

Senator DECONCINI. I thank the chairman, I want to say the chairman has been fair in having extensive hearings, and I thank him for doing that.

Senator HATCH. Thank you. Senator, could I raise one point?

Senator DECONCINI. I yield.

Senator HATCH. Ms. Freedman, you were talking about the current law in State action and how you expect that to continue, but in the Yale Law Journal you state with great certainty: "The current state of the law on State action in the field of education will be subject to further development as the goals of the ERA are pressed upon the courts."

You did not seem nearly as confident that the law on State action was going to remain the same if the equal rights amendment were passed, or at least you did not back in 1971.

Professor **Freedman**. There has been a substantial change in State action doctrine. In fact, when I was in law school my first law school paper was a paper on State action and I said it was a conceptual disaster area and the Court did not know where it was going, and there were developments of all sorts of possibilities at that time.

Senator **Hatch**. Are you saying it does know where it is going now?

Professor **Freedman**. Yes. There has been a dramatic change in State action doctrine and the Court has adopted some fairly clear principles in no uncertain terms.

Senator **Hatch**. But you do not think the ERA will have any impact on the present status of the State action doctrine?

Professor **Freedman**. I happen to think the State action doctrine is too restrictive and I wish I thought that there was going to be a little bit of change because I think they have gone too far to one extreme. But in terms of predicting what they will do, I do not think so.

I also think that if Congress wants State action to mean anything different than it does mean, then they will have to say so.

Senator **Hatch**. Then the doctrine of State action applicable to the 14th amendment would apply under the equal rights amendment if it is passed and ratified?

Professor **Freedman**. What? I do not understand.

Senator **Hatch**. Will the 14th amendment definition of State action then apply to the definition of State action under the equal rights amendment?

Professor **Freedman**. State action, as the Court is currently applying it, is a fairly consistent doctrine from one constitutional provision to another.

Senator **Hatch**. I am sorry to interrupt you, Senator.

STATEMENT OF SENATOR DENNIS DeCONCINI

Senator **DeConcini**. Thank you, Mr. Chairman. By way of preface to my questions, I must acknowledge that I find myself in a difficult position on the issue before us, so I welcome these hearings.

I strongly support and am a cosponsor of the equal rights amendment. I also strongly support prolife legislation, and have done so throughout my career in the Senate. In my mind, there is no connection whatsoever between the ERA and abortion. I further believe that no such connection could or should be made here.

Even if the Supreme Court, in its wisdom, reverses itself on the use of the privacy doctrine to permit abortion, I do not believe the ERA should or would serve as a substitute rationale.

I, and I suspect a number of other colleagues who are also in the pro-ERA, prolife category—and there are close to a dozen of us in the Senate—would have great difficulty supporting the ERA if we felt that it could be interpreted by a future court to give assistance in any degree to forces that have a prochoice attitude toward life or death of the unborn.

It has only been recently that I have become aware of some people's fears of a possible ERA and abortion connection. I respect those views, of course.

Certainly, as I arrived at a position of support for the ERA, I had no inkling that somehow it might be construed someday to impact on the abortion issue. I am encouraged that the legislative history that will be made today by Professor Freedman and Professor Noonan, particularly Professor Freedman as the consensus witness for the pro-ERA women's groups, will also reflect that there is no connection today, nor is there intended to be any connection in the future, between the ERA and abortion.

I agree that the legislative history is going to play a most controlling role when and if this passes and when and if the Supreme Court decides or takes the issue before it.

With that in mind, I would like to ask Professor Freedman a series of questions, if I might, to have as clear and concise a legislative history for this Senator and perhaps others.

If you would be so kind, Professor, to answer them. I have read your statement and some of them are answered there, but I want to have it clear in my mind.

The first question is, will the adoption of the ERA have any impact on abortion policy?

Professor **Freedman**. No, it will not have any practical impact on abortion policy.

Senator **DeConcini**. Thank you. Will the ERA reinforce or supplement the theory of abortion rights established by the Supreme Court in the abortion cases?

Professor **Freedman**. No.

Senator **DeConcini**. Will the ERA expand abortion rights already delineated by the abortion cases?

Professor **Freedman**. In my opinion, no.

Senator **DeConcini**. Will the ERA create any new abortion rights?

Professor **Freedman**. No.

Senator **DeConcini**. Will the ERA have any impact on the Federal, State, or local limitations on public funding of abortions?

Professor **Freedman**. No.

Senator **DeConcini**. Would the ERA overrule the Hyde amendment?

Professor **Freedman**. No.

Senator **DeConcini**. Will the ERA lead to more abortion on demand?

Professor **Freedman**. Do you mean in terms of people seeking abortions?

Senator **DeConcini**. No. Just the fact that we had an equal rights amendment—would that——

Professor **Freedman**. Do you mean would it change the standards for which kinds of abortions were constitutionally permitted?

Senator **DeConcini**. That is correct.

Professor **Freedman**. No.

Senator **DeConcini**. Will the ERA render the right to abortion absolute during the third trimester of pregnancy?

Professor **Freedman**. No.

Senator **DeConcini**. Will the ERA result in people being forced to perform or assist in abortion operations or else be subject to penalties? I think you have answered that very clearly and distinctly.

Professor **Freedman**. No.

Senator **DeConcini**. Much has been said by parties on both sides of the ERA and abortion question regarding the legislative history. I want to reiterate that I do not see, and do not intend any connection between the issues.

Our witness today has clearly stated that there is no connection. I think her statement is very distinct. Professor Noonan disagrees with that, and comes forward with an argument that I respect. However, I cannot conclude that his argument is overwhelming.

Professor Freedman, you have so eloquently presented the case as to why there is no connection and no intended connection between abortion and the ERA. The prolife forces feel that stating this explicitly in the equal rights amendment is necessary, and they ask why should we not do it if there is no intended connection?

They propose the addition to the ERA of the so-called Sensenbrenner amendment. Although I am sure you know how it reads, I will read it here. "Nothing in this article shall be construed to grant or secure any right to abortion or the funding thereof."

Now, I have read your statement about the problems with adding any kind of additions, including abortion riders or amendments or clarifications or anything else, to the ERA. But can you support the Sensenbrenner amendment or any other kind of amendment that states that the ERA will not grant or secure abortion rights?

Professor **Freedman**. Would I agree to amending the amendment and adopting the Sensenbrenner amendment?

Senator **DeConcini**. Yes.

Professor **Freedman**. No, I do not think that is a desirable course.

Senator **DeConcini**. Could you propose any acceptable amendment?

Professor **Freedman**. No. First of all, I do not think it is necessary to propose an amendment because I think the legislative history controls, and because I think it is clear that the ERA has no practical impact on abortion decisionmaking by the Supreme Court. It is an extremely convoluted argument to make the connection, but also the Sensenbrenner amendment is not the only amendment that is being proposed.

It is not a question of one amendment or another amendment. There are many subjects within the ERA on which various Members of Congress are concerned. I do not agree with any of the substantive concerns they have, but it is not for me; it is for Congress.

I think once you start amending, you start casting negative implications about the legislative history as a guide.

Senator **Hatch**. I do not mean to cut in on Senator DeConcini, but I have the same concern he does. To clarify the ambiguity, why do you not suggest to us what language could be added—it could be as short as possible—to clarify this so that there is no longer the debate between proponents of the equal rights amendment and a raft of prolife organizations now opposing the ERA on this basis?

Professor **Freedman**. Because that is exactly my point. The addition of any language to the amendment other than the language that is already there is to suggest that Congress is not going by the general legislative history and theory of the amendment and the specific examples that they have referred to, but that they are beginning to draft specific language to deal with specific concerns.

Once you begin putting in specific language on one topic, the question arises, why did you not adopt all these other modifying amendments? When Senator Ervin proposed amendments in the previous consideration of the ERA in the early 1970's, he put in some amendments which agreed with the interpretation of the amendment which the proponents were urging. He put in other amendments which disagreed with the legislative history. All of those amendments were rejected.

Senator **Hatch**. I understand that.

Professor **Freedman**. But once you start putting in some which are consistent with legislative history and others that are not, you start raising the possibility that when you adopted one of them and not another, you meant to reject what was said in the legislative history and substitute the amending process as a guide to judicial interpretation.

Senator **Hatch**. All Senator DeConcini and I are saying is you can clarify this whole matter and perhaps attract more supporters for the amendment if you just put a simple——

Professor **Freedman**. But it will not be just that amendment, Senator. That is not going to be the only one that is going to be considered.

Senator **DeConcini**. Well, if the chairman would let me interrupt just a minute. You know, we go through this all the time. When you are the author or the cosponsor of legislation and you go through the process, you try to keep what is called a clean bill or amendment on the floor.

Senator **Hatch**. That is true.

Senator **DeConcini**. We went through that with the balanced budget amendment; we went through that with the human life amendment. Of course, I look at it a little differently. I think that the process here is to offer those amendments. And, of course, the proponents of legislation and the ones that have studied it so long, including myself, usually feel they are the authority and have got to stop any amendments.

Usually, we do that on the floor. For instance, Senator Armstrong was one that succeeded in putting an amendment on the balanced budget amendment, and I believe nothing bad was served by that; it still passed. So I have a little problem with that argument.

But let me ask you this, Professor Noonan, if the chairman would continue to yield.

Senator **Hatch**. It is your floor.

Senator **DeConcini**. If you do not add amendments to the actual constitutional equal rights amendment, what about legislation that could be enacted restricting its scope? We have such rules of criminal and civil procedure that have been upheld by the courts, such as restrictions on inquiry into the background and sexual behavior of a rape victim or the mention of insurance carriers in civil liability cases.

Those have been upheld so as to restrict the court and the whole judicial proceeding from entertaining that type of evidence. Now, what if there was legislation? Would a restrictive statute directly relating to women's reproductive capacities or functions survive what you have interpreted as the strict scrutiny test?

Professor **Noonan**. I very much doubt it, Senator. Even in the tax area that we got into through *Bob Jones* where you have the 16th amendment giving Congress plenary power, Congress has been legislating on tax exemptions ever since 1916. And as the dissent points out in *Bob Jones*, Congress was pretty specific about who was entitled to tax exemptions. That did not stop the Court one bit.

The Court gets the bit in its teeth; the Constitution gives it the bit and lets it run. All kinds of constitutional considerations get put into the statute, and the statute either is bent quite a bit, as happened in *Bob Jones*, or it disappears.

I am afraid when you get on the books a vast, vague amendment of this character, I do not see, Senator, frankly, in conscience, when you know that title VII are the precedents and you see the "but for" test in place now, how you can believe that abortion would not——

Senator **DeConcini**. Well Professor——

Professor **Noonan**. You, as a Senator, had to vote for the Pregnancy Discrimination Act and exempt abortions.

Senator **DeConcini**. Professor Noonan, your argument is a good attempt, I must say, but it does not convince this Senator. I have read the *Newport News* case since I talked to you and my conclusions are much more in the direction of Professor Freedman's arguments than in yours. It may be a difference of interpretation in the "but for" test.

Let me ask the same question of Professor Freedman regarding the strict scrutiny test as to legislation versus any amendment on the ERA.

Professor **Freedman**. Is this legislation you are talking about to say something about what the ERA means in this area or is this legislation just relating to reproductive——

Senator **DeConcini**. Yes, relating to women's reproductive capacities or functions. Could that survive the strict scrutiny test?

Professor **Freedman**. Legislation about public funding of abortions relates to women's reproductive functions.

Senator **DeConcini**. Right.

Professor **Freedman**. And it is my position that such legislation, passed before or after the adoption of the ERA, would stand or fall based on a privacy analysis. So if it is consistent, for example, with the existing medicaid laws that were upheld in *Harris* v. *McRae*, it is my position that they would receive the same outcome that they receive now, with or without the ERA.

Senator **DeConcini**. But if the ERA were in place——

Professor **Freedman**. It would still come out the same.

Senator **DeConcini**. Of course, Congress could repeal such legislation, too, if it passed it.

Professor FREEDMAN. Right.

Senator DECONCINI. But if Congress passed such legislation you think it would pass the strict scrutiny test?

Professor FREEDMAN. Yes, the same as it does——

Senator DECONCINI. The same as it does now with the Hyde amendment or any other——

Professor FREEDMAN. Yes. I do not think the Court would even address it as strict scrutiny under the ERA, but if they did, it is strict scrutiny. As far as I am concerned, it is strict scrutiny; it is the same beast. And if they changed their minds and struck it down, they would do it because they had changed their view of strict scrutiny under privacy. That could always happen, but they would not be doing it because of the ERA; they would be doing it because they changed their minds about privacy.

Professor NOONAN. I would like to comment, since Professor Freedman once more brought up *Harris* v. *McRae*. She has talked about the privacy part of that. The Court spent several pages in there on equal protection, and said in so many words that under our equal protection approach, we are not giving a strict scrutiny to this class of indigent women.

It would be different if this was a suspect class. Now, you cannot come in here really and say that they applied a suspect class category. They explicitly in the equal protection part say they are not applying that test.

But if the ERA were in place, we all agree the suspect category test would have to be applied.

Senator HATCH. And if that applies, what results?

Professor NOONAN. If that applies, then the funding has to be mandated; Hyde falls.

Senator HATCH. I do not think there is much question about it.

Senator DECONCINI. I disagree. Thank you.

Senator HATCH. Senator, could you wait for just a second?

Senator DECONCINI. I yield.

Senator HATCH. Let me just make a couple of points. You have indicated that as far as you are concerned, the legislative history is clear that, as a practical matter, the passage of the ERA would have no effect on the present law of abortion. But it is not so clear.

Let me just offer you some quotes from the top proponents of the equal rights amendment. These are arguments made in court, by the way.

Professor FREEDMAN. That is not legislative history, Senator.

Senator HATCH. Yes, it effectively is.

Professor FREEDMAN. Is it in the legislative history?

Senator HATCH. You bet it is.

Senator DECONCINI. Well, it is going to be.

Senator HATCH. I am making it legislative history.

Professor FREEDMAN. But not by a proponent; no proponent has adopted that analysis.

Senator HATCH. Unfortunately, these are all proponents who have articulated this analysis.

Professor FREEDMAN. Now, wait a minute. I am talking about a senatorial or congressional proponent. Has a Member of Congress or a Senator adopted those statements as correct statements of the ERA?

Senator **Hatch**. Senator Packwood and Senator Tsongas had the opportunity to disclaim them and failed to.

Professor **Freedman**. When I say that the legislative history is not clear, I want to be clear who I am talking about.

Senator **Hatch**. Let us not split hairs.

Professor **Freedman**. I am not.

Senator **Hatch**. This is clearly part of the ERA's legislative history.

Senator **DeConcini**. But not for the proponents.

Senator **Hatch**. Well, these are the proponents who are going to litigate it afterward. That's what is important.

Senator **DeConcini**. But you are putting it in; that is the point, I think. [Laughter.]

Senator **Hatch**. Well, not necessarily.

Professor **Freedman**. Senator, I just want you to know that when I say "proponent" in this context, I mean a senatorial or congressional proponent of the amendment in Congress.

Senator **Hatch**. I understand.

Professor **Freedman**. And if you are using "proponent" to mean outside——

Senator **Hatch**. I believe some proponents in the ERA debate have already placed these in, but if I am wrong, that is fine. [Laughter.]

These are four instances of important litigation under State ERA's. If they are wrong, let us hear that from congressional proponents. Let me ask you if you agree with these statements:

> Reimbursement for abortions as a matter of right rests on the Hawaii constitution's ERA, which provides that equality of rights under the law shall not be denied or abridged by the State on account of sex. Abortion is a medical procedure performed only for women. Withdrawing funds for abortion while continuing to reimburse other medical procedures sought by both sexes or only by men will be tantamount to denial of equal rights on account of sex.

Do you disagree with that statement?

Professor **Freedman**. As a matter of what the Hawaii ERA requires, yes, I disagree. The analysis you present sounds like a facial classification analysis and the correct analysis is unique physical characteristics.

Senator **Hatch**. Do you disagree with it with regard to the Federal ERA?

Professor **Freedman**. Yes. I think the Federal ERA——

Senator **Hatch**. Does not require that?

Professor **Freedman**. Yes, because the test to be applied goes by the legislative history of the Federal ERA, and it is clear that that is not what the legislative history says.

Senator **Hatch**. Are you saying that if this is not in the legislative history, there is no way that any Supreme Court of the United States is going to change the present abortion law if the ERA passes?

Professor **Freedman**. I am trying to understand what you are adding to what I have already said. I have said I think that the Supreme Court will do what it has been doing, which is that it will continue to adhere to privacy analysis and the ERA will not change it. I think that is what you just said.

Senator **Hatch**. If the ERA is passed, will the equal protection clause of the 14th amendment have any effect on the issue of abortion?

Professor **Freedman**. The 14th amendment? We have the 14th amendment.

Senator **Hatch**. I am asking if the 14th amendment—the equal protection clause—will have any effect on the issue of abortion once the equal rights amendment is passed.

Professor **Freedman**. That is right. Let me say one thing, by the ERA?

Senator **Hatch**. It will not be affected by the passage of the ERA.

Professor Freedman. That is right. Let me say one thing, by the way. Commenting on the Hawaii thing, I really should clarify that I do not know the legislative history of the Hawaii ERA, so I suppose it is possible that there is some justification in the legislative history of the Hawaii ERA that I am not familiar with.

In terms of the language of the Hawaii ERA, which I understand to be the same as the Federal ERA, it should have the same meaning. But since I am relying in part on legislative history, I do not know the legislative history of the Hawaii ERA.

Senator **Hatch**. Well, if it will not change the standard legislatively, then what is the purpose of the ERA? I thought the purpose was, as evidenced by your article, to adopt a new absolute standard for judging sex discrimination.

Professor **Freedman**. An absolute standard about facial classifications.

Senator **Hatch**. All right.

Professor **Freedman**. This is not a facial classification; this is a unique physical characteristics classification. Those are different under the Federal ERA.

Senator **Hatch**. Unique physical characteristics? Let me ask you about the California Commission on ERA. It says as part of any wide-scale effort to ensure the rights of women prisoners, every step should be taken to assure that female inmates are informed of their right to obtain an abortion. They must further be told of the prison's duty to pay for abortions as it would pay for any other needed medical care.

If the ERA passes, do you disagree with that statement?

Professor **Freedman**. I do not even understand the connection to the ERA that you are asserting. They are saying it is a good thing for women to be told——

Senator **Hatch**. If the ERA passes, they state, then women in prison will have a right to an abortion and the State will have to pay for it.

Professor **Freedman**. I understand their saying that women should be told that they have a right to an abortion, if they have a right to an abortion. Is that not what you just said? They did not say that women had a right to it. They said if the women had a right to it, they should be told.

Senator **Hatch**. That is not the way I read it.

Professor **Freedman**. Well, that is how I understood the statement.

Senator **Hatch**. Well, let me quote Judith Copelon. Judith Copelon says "the separation of abortion from the campaign for ERA has jeopardized——

Professor **Freedman**. Who is this you are speaking of?

Senator **Hatch**. Judith Copelon.

Professor **Freedman**. I think you mean Rhonda Copelon.

Senator **Hatch**. Maybe it is Rhonda.

Professor **Freedman**. I do not know who Judith Copelon is. I know who Rhonda Copelon is.

Senator **Hatch**. Well, maybe it is Rhonda, then. I am sorry.

This was in a Ms. Magazine article in October 1983: "The separation of abortion from the campaign for the ERA has jeopardized abortion and produced a truncated version of liberation." Do you agree or disagree with that statement?

Professor **Freedman**. No, I do not agree with it.

Senator **Hatch**. You say legislative history is extremely important in determining the meaning of the ERA and that you are helping to establish the history that there will be no practical effect on the present state of law on abortion should the equal rights amendment pass.

Would you support a statement by the leading ERA proponents in the official reports of each House of Congress to the effect that the ERA is abortion-neutral?

Professor **Freedman**. Since I believe the ERA is abortion-neutral, I could have no objection.

Senator **Hatch**. So you could support a statement in the reports of both Houses of Congress by the proponents that the present status of abortion would not be affected by the equal rights amendment?

Professor **Freedman**. Yes. In their judgment, the ERA would have no practical effect is the same statement you have just said. And since I think that is true——

Senator **Hatch**. Would you support a statement that it would have no effect, leaving out the word "practical"?

Professor **Freedman**. I prefer to use the word "practical" effect because I am concerned about confusing the idea of whether they mean strict scrutiny about reproductive regulations under the ERA independently.

Senator **Hatch**. Let us be very specific and limit it strictly to abortion and the present law on abortion. Could you support a statement that it would not affect the present law on abortion one way or the other?

Professor **Freedman**. I think so, yes. I see that as the equivalent of saying no practical effect, which is what I have been saying is true. So if they say it is our understanding that the ERA has no practical effect on abortion, and therefore the ERA is abortion-neutral, that seems to me a correct statement of the prediction of what the ERA will do and what they intend.

Senator **Hatch**. So you are saying that your testimony here today ought to be the governing testimony because you are a proponent of——

Professor **Freedman**. No. When I use the term "proponent," I am speaking of if my testimony is adopted by a proponent in Congress or the Senate, it becomes governing legislative history. The fact that I support the ERA and a Congress person supports the ERA does not make me legislatively history.

The reason why the Yale Law Journal article was legislative history was because it was adopted by proponents in 1971, not because I also support the ERA.

Senator **Hatch**. Do you belong to the National Organization for Women?

Professor **Freedman**. Yes.

Senator **Hatch**. They passed a resolution on the ERA at the national NOW conference on October 2 of last year. It said: "Therefore, be it resolved that the National Organization for Women serves notice on Congress that we will accept no amendments to the ERA, and that any sponsor willing to accept amendments should remove her or his name from the list of sponsors." Do you agree with that? You have basically testified that way here.

Professor **Freedman**. Yes. I think it is a bad idea to put amendments on the amendment, and I think that the proponents should not agree to do that.

Senator **Hatch**. OK.

Professor **Freedman**. I am not sure I would go so far as to talk about who should put their name on or take their name off because I think that is sort of a fine political judgment. But I definitely oppose amendments to the amendment.

Senator **Hatch**. Let me proceed step by step.

Professor **Freedman**. Just a moment, Senator Hatch.

Senator **Hatch**. Yes, go ahead.

Professor **Freedman**. I could use a break at this point, if we could.

Senator **Hatch**. I am sorry; we should have already had a break.

Professor **Freedman**. Only 5 minutes, but I really need it.

Senator **Hatch**. Let us take a 5-minute break and then we will resume as soon as we can.

Professor **Freedman**. Thank you.

Senator **Grassley**. Could I take advantage of the opportunity to ask Professor Noonan a question? I do not have a question for Professor Freedman.

Senator **Hatch**. You sure can.

Senator **DeConcini**. Well, Mr. Chairman, I do not want to interfere with the Senator from Iowa, but it seems to me that it is good to have the main pro-ERA witness here to listen to the question.

Senator **Hatch**. Can we take 5 minutes?

Senator **Grassley**. Just as long as I can get out of here by 11:30.

Senator **Hatch**. I am sorry; I should have turned to you, also. Let us take a 5-minute break. We will be back here at about 22 after.

[A brief recess was taken.]

[Senator Grassley assumed the Chair.]

Senator **Grassley**. Senator Hatch asked me, while he is still having a discussion, if I would commence the meeting after the recess that he called, and I am happy to do that.

I have an opportunity at this point, I think, based upon Senator Hatch's indication to me that I could ask a question that I desired to ask—I actually had several questions to ask, I would say, for the record, except staff told me during my absence that most of them had been addressed.

But there is one of Professor Noonan in regard to the States that he studied who have adopted constitutional provisions, and that is whether or not you believe based on your study that members of these State constitutional conventions—and I do not know; maybe in some instances they were proposed by the legislature—but in either instance, whether the individuals involved realized at the time that they adopted the ERA-like language that they were providing a legal basis for abortion funding by their States.

Professor NOONAN. Well, Senator Grassley, I can speak about Massachusetts, which is my native State. They were solemnly advised by Prof. Lawrence Tribe of the Harvard Law School that the State ERA would have no effect on abortion or abortion funding.

They went ahead and enacted it and then the Massachusetts affiliate of the ACLU was soon in court maintaining exactly the opposite position. So I think that you can get all the easy assurances from people who want an ERA to go through, but unless there is something there in the amendment, the same people may well be in court the next day, if it is enacted, urging exactly the other interpretation.

Senator GRASSLEY. Have you had an occasion to review any debate or discussion from either a primary or secondary source that would indicate that during the discussion of the proposed amendments in these States that there was any discussion of the issue?

Professor NOONAN. I should say candidly I have not followed the discussion of the State ERA's in the other States. I happen to know Massachusetts because that is where I come from, but I have focused on the ERA we have before us.

Senator GRASSLEY. Even though I did not ask you, Professor Freedman, if you would like to comment on my question, I would be happy to have you do it. That is the only question I have.

Professor FREEDMAN. Yes. One of the things about some of the States is they do not have printed legislative histories, so you have to rely on committee reports or something. I am not aware of any references saying that they do support abortion rights in any of the amendments, but I have not made a careful study of it.

What I would say as to Professor Noonan's comment that, people say one thing, then another, and his suggestion that people are talking out of both sides of their mouths is this: sex discrimination arguments about abortion are made all the time and it is no secret; they are made under the 14th amendment and they have been made since the beginning of the litigation about abortion, as far as I am aware.

I think the important point for Congress is not whether those arguments can be made, because an argument can be drafted; that is not the question. The question is, as a practical matter, will it have an effect on the courts and what does Congress intend about those arguments, not will someone make them.

I think advocates will try to do the best they can, and people who want to promote abortion choice and who feel that abortion rights are endangered will draw on whatever arguments they can possibly think up, many that I am sure have never been thought up. People will think up arguments. That is not the question.

People argue all kinds of speculative arguments about one thing or another. I think the question is what does the legislative history say and what will the Court pay attention to, and I think that is the question.

And in the State circumstances, whatever has been said one way or the other, the State courts have not found any connection.

Senator **Grassley**. Senator DeConcini, I did not have any other questions. I have an 11:30 appointment. Would you be able to assume the Chair until Senator Hatch gets back?

[Senator DeConcini assumed the Chair.]

Senator **DeConcini**. I certainly will, Senator Grassley. I do not have any further questions myself and I do not know what the chairman's desire is, how late he intends to go today. I think we have had a long session and we ought not to burden the witnesses much past 12, in my judgment, but we will wait just a few minutes for the chairman to return.

[A brief recess was taken.]

[Senator Hatch resumed the Chair.]

Senator **Hatch**. Professor Freedman, there have been three proponents of the ERA who have testified on this issue: you; Senator Tsongas, who said that the courts will decide this issue; and Senator Packwood, who also said that the courts will decide this issue.

At least two of you have further stated that you would not want an amendment, either in the form of the Sensenbrenner amendment or any other amendment that would clarify or resolve the issue. Are the statements of Senators Tsongas and Packwood, both congressional ERA proponents, the kind of legislative history to which you are referring?

Professor **Freedman**. What we have said and what who has said? I could not hear the word.

Senator **Hatch**. Do the statements of Senator Tsongas and Senator Packwood constitute the kind of legislative history to which you are referring in your testimony?

Senator **DeConcini**. Mr. Chairman, would you yield on that matter?

Senator **Hatch**. Yes.

Senator **DeConcini**. I agree with you that Senator Packwood made those statements, but I think in fairness to Senator Tsongas, he was not advised at that opening hearing that the chairman was going to go into the depth of questioning that he did.

I have talked to him and I know that you have given him an opportunity to respond in writing and I believe he has not yet done it.

Senator **Hatch**. That is right.

Senator **DeConcini**. I suspect he will do it prior to the markup here.

Senator **Hatch**. I also suspect he will.

Senator **DeConcini**. I am quite sure he will, and I think it is only fair to say that with the proponent from the State of Massachusetts, he was not informed that there was going to be indepth discussion and cross-examination, if I can use the word, by the good chairman.

Senator **Hatch**. I am concerned with what is currently in the legislative record. Now, Senator Tsongas may come in and say he agrees totally with Ann Freedman. He has every right to do that, but the state of the record is that both he and Senator Packwood have said that the courts are going to have to decide this issue. That is the state of Ms. Freedman's legislative history.

Professor **Freedman**. I do not understand clearly whether that is, in fact, a conflict. I mean, I am making a prediction that——

Senator **Hatch**. Are you saying that the courts will have to decide the issue, also?

Professor **Freedman**. What I am saying is that there is some implication to that, apparently, that seems inconsistent to you and I do not understand that.

Senator **Hatch**. Do you feel that the courts will have to ultimately decide this issue?

Professor **Freedman**. I think that ERA arguments will be made to the courts, yes.

Senator **Hatch**. And they can decide it either way?

Professor **Freedman**. In terms of constitutional power, they have the power to interpret the Constitution. What I am saying is a prediction about what they will do. I am saying, as a practical matter, it will not have any effect because, in my judgment, they will firmly adhere to privacy analysis. But I am not saying that the case will not be presented to the courts.

So to say that the courts will decide is to say that the courts will do what they are supposed to do. Someone will come in with an argument and they will say we stick with the privacy analysis and this is what we do.

Senator **Hatch**. Let us assume that the ERA is ratified. If you were approached by a prochoice organization to relitigate the Hyde amendment, would you be inclined to do so and, I might say, under sex discrimination lines this time, which would then be the new argument? Would you agree to do that?

Professor **Freedman**. Would I agree to take the case?

Senator **Hatch**. Sure.

Professor **Freedman**. I doubt it. I mean, at the present time, Senator——

Senator **Hatch**. Could you take the case?

Professor **Freedman**. I am not in the business of much litigation these days for some obvious reasons.

Senator **Hatch**. I understand, I understand. But let us assume that you resume litigation; let us assume that your baby has been delivered and that everything else is equal. A prochoice group comes to you and would like to litigate the Hyde amendment on sex discrimination lines. Would you consider taking that case?

Professor **Freedman**. I would be inclined to say I think you do not have a chance of winning and I do not think it makes sense for you to spend the resources it is going to take you to bring the case.

Senator **Hatch**. So you would not take the case, then?

Professor **Freedman**. Based on what I have just said, I do not think so.

Senator **Hatch**. OK. That is all I wanted to know.

Professor **Freedman**. Who knows what wonderful opportunities will present themselves for fame and fortune in litigating on who knows what before the Supreme Court? I may say, well, the opportunity to appear before the Supreme Court, which I have never done before—I am going.

Senator HATCH. I am not asking about all the wonderful things that could happen. I am asking about this one very narrow issue.

Professor FREEDMAN. I think it would not be a very strong argument.

Senator HATCH. Let me go to another question. As I understand it, you would like to leave at 12:30. I cannot complete my line of questioning by 12:30, but I am willing to reschedule this hearing because I want to accommodate you in every way I can.

Professor FREEDMAN. Senator, it was my understanding that the hearing was only scheduled to go to 12:30. I must have misunderstood what Mr. Feidler told me.

Senator HATCH. Apparently there was some misunderstanding. I am willing to accommodate you in any way. I am sorry.

Senator DECONCINI. Could I interrupt the chairman? Could not the chairman submit the questions in writing?

Senator HATCH. No, because I want to have both of them here so we can benefit from the interplay between them. This has been, I think, a valuable aspect of these hearings. We have been able to listen to two of the best people on this issue in the country respond to one another's arguments.

Senator DECONCINI. I am partly responsible for indicating that the hearings today, at least, from the proponents' side, would not last past 12:30. But the chairman has the right to call as many hearings as he desires.

Senator HATCH. I have no problem with that, Senator DeConcini. I am going to honor your request that we finish at 12:30, and respect Ms. Freedman's wishes in the process. But I think, too, that this is a very important subject and it would be regrettable if we do not finish today.

We could go tomorrow; we could go any other time you would like to. We could even do it on the weekend; I do not care.

Professor FREEDMAN. My availability is not affected by weekends or weekdays. I am in a process as to which the control of timing is not in my hands.

Senator HATCH. I understand. Well, let me just go as fast as I can and maybe I can get through some of them if you can both answer succinctly. I may not go back and forth, so let me know if you want to respond.

Let me focus on what seems to be the most recurrent matter raised by the opponents of the present language of the ERA, the issue of public funding of abortions. In your understanding Professor Freedman, what is the present state of the law with respect to abortion funding?

Are limitations on such funding such as the Hyde amendment clearly constitutional?

Professor FREEDMAN. My opinion is that *Harris* v. *McRae* is the governing law on the subject, with *Williams* v. *Zbaraz*, and I think there is another case, the *Miller* case, that came along.

Senator HATCH. And *Beal* v. *Doe* as well, I think.

Professor FREEDMAN. And the *Maher* case.

Senator HATCH. In *Harris*, the plaintiffs who wanted to overturn the Hyde amendment argued that the amendment violated the woman's right to privacy, as described earlier in *Roe* v. *Wade*.

Now, is it correct that the Court rejected that argument? Would the ERA change this argument in any way? I think you have said it would not, but let us clarify it.

Professor FREEDMAN. Well, no, because the argument has to do with the constitutional right to privacy.

Senator HATCH. Then the ERA would not change it, if that were the sole argument?

Professor FREEDMAN. No, no.

Senator HATCH. If I am correct, however, the Court was also confronted in *Harris* with the argument that the Hyde amendment violated the equal protection clause of the 14th amendment.

Plaintiffs argued that the provision discriminated against indigent women who could not have otherwise obtained an abortion. Is it correct that the Court also rejected that argument?

Professor FREEDMAN. Yes.

Senator HATCH. OK. Would the ERA change the argument that denial of abortion funding is sex discrimination?

Professor FREEDMAN. Would it change the argument about poor women, about indigency?

Senator HATCH. That is right.

Professor FREEDMAN. No. It is an equal protection argument about indigency.

Senator HATCH. Would the ERA change the argument that the Hyde amendment discriminated against women.

Professor FREEDMAN. Let me just say what I understand. The plaintiffs argued that it was a violation of the equal protection clause on the bases of privacy, indigency, and sex.

Those arguments, which are based on the equal protection clause, could still be made after the ERA. An ERA argument could also be made. All of those arguments——

Senator HATCH. So you are saying it could be made?

Professor FREEDMAN. Yes, an ERA argument can be made.

Senator HATCH. As to sex discrimination in general?

Professor FREEDMAN. Sure. The argument could be made, and the answer would be all of those lead to strict scrutiny because the argument based on ERA is a unique physical characteristics argument. The argument based on sex is an intermediate scrutiny argument. The argument based on poverty is that it should be a suspect class. The privacy argument is strict scrutiny and the result comes out the same because there is no standard in any of those arguments that is higher than strict scrutiny, which is required by privacy. So you get a new argument, but not a different result.

Senator HATCH. As I understand it, the Court rejected the equal protection argument, because they concluded: "It is not predicated on a constitutionally suspect classification."

Professor FREEDMAN. You are talking about the poverty argument, because they did not address the sex argument?

Senator HATCH. That is, there is no class of indigent women entitled to special constitutional protection as there is a class of racial minorities, for example.

Professor FREEDMAN. Yes. They rejected it.

Senator HATCH. Well, is it not the purpose of the equal rights amendment to raise the sex classification to the same constitutional status as race classification?

Professor FREEDMAN. No.

Senator HATCH. To go beyond it?

Professor FREEDMAN. No. It is a different standard; it is not the same. It is a different standard. It is not permissible to use sex classifications, but this is not a sex classification.

Senator HATCH. Well, Congressman Don Edwards said it is the same standard, and he is the chairman of the Constitutional Rights Subcommittee in the House and a proponent of the ERA.

Professor FREEDMAN. No, that is not what I understand.

Senator HATCH. Is that not good legislative history, if he does say that?

Professor FREEDMAN. If he says that it is a suspect class standard, that is the governing legislative history. That is not what I understand his current position to be. I understand him to be saying what we have said all along, which is that sex is not a permissible classification.

But either way, we are not talking here about a sex classification. We are talking about a classification based on a unique physical characteristic.

Senator HATCH. I do not believe I have detected any disagreement among either proponents or opponents of ERA that the purpose of the amendment is to at least establish strict scrutiny as the standard of judicial review for sex classifications. Aren't I correct?

Professor FREEDMAN. At least, certainly, but it is different.

Senator HATCH. It may be more rigorous, but at least——

Professor FREEDMAN. It is just different. It is not permissible to use sex classifications, but the point is this is not a sex classification so I do not know why we are having so much discussion of it. This is not a sex classification.

I am talking about facial sex classifications—under the ERA, you cannot use a classification that says men and women are treated differently.

Senator HATCH. Well, am I correct in my assumption that if a law such as the Hyde amendment is challenged on alternative grounds—that is, either the right to privacy or equal protection—that it will be overturned if it is in violation of either constitutional provision?

Professor FREEDMAN. Sure.

Senator HATCH. Now, given that the express purpose of the ERA is to elevate sex to a suspect classification, akin to race, why could not a reasonable observer assume that *Harris* v. *McRae* would be altered by the ERA?

Professor FREEDMAN. Because the standard under privacy is strict scrutiny and the standard for unique physical characteristics is strict scrutiny. So the question is, What does strict scrutiny require?

We do not have to speculate about what strict scrutiny requires. The standard for privacy has been reaffirmed since *Harris;* it was affirmed in *Harris*. It is strict scrutiny. The Court made certain distinctions based on whether it was a restriction on a woman's right to choose or not, not based on the standard of review.

They did not say we have a different standard of review. It is strict scrutiny, strict scrutiny, strict scrutiny. So we know what they do in strict scrutiny. They say funding is different from a criminal abortion law.

Senator HATCH. Professor Noonan, what do you have to say on that? Is it strict scrutiny or not, and what does that mean?

Professor NOONAN. I was intrigued by Professor Freedman saying the ERA argument could be made and would be made on funding. Now, I assume that no lawyer, however zealous an advocate, would make an irresponsible argument.

So I take it that when she admits the argument would be made, that is a reasonable interpretation of the ERA; that it invalidates the funding. So I think she has come half way in admitting that we have got a very reasonable doubt here.

Four Justices of the Supreme Court said that they thought, even under the weak equal protection standard, funding should be mandated. They were not dealing with a suspect class. It is unconceivable to me, when you now create a suspect class, that there would not be a powerful reason for applying the suspect classification rule on behalf of sex discrimination in order to mandate abortion funding.

I do not think there is any doubt about the way it would go. But trying to at least meet her half way, I think she agrees there is at least a reasonable possibility. Yet, she is dealing with something that is abhorred by a large part of the country. She will not agree to the simple amendment that would obviate the doubt. Why not?

Senator HATCH. Let me read from *Harris* v. *McRae*. It says:

> This presumption of constitutional validity, however, disappears if a statutory classification is predicated on criteria that are, in a constitutional sense, "suspect," the principal example of which is a classification based on race.

They continue subsequently,

> For the reasons stated above, we have already concluded that the Hyde amendment violates no constitutionally protected, substantive rights. We now conclude as well that it is not predicated on a constitutionally-suspect classification.

So this particular case was decided as it was explicitly because there was no suspect classification.

What do you have to say about that, Professor Noonan?

Professor NOONAN. I think that is exactly right. I think Professor Freedman has given us one half of the case. The Court in so many words does not agree with her. The Court itself says we are not dealing with a suspect class.

Now, we create a suspect class with the ERA. The whole decision framework is changed, and I cannot understand, Professor Freedman, why you do not see that; I really do not.

Senator HATCH. Let me see if I can ask a question that might help clarify it. Under the language of the proposed ERA, Professor Freedman, would a pregnancy classification such as we find in the Hyde amendment be treated as a classification on the basis of sex?

Professor FREEDMAN. No.

Senator HATCH. It would not?

Professor FREEDMAN. It is accorded strict scrutiny precisely because it is not a sex classification. If it were a sex classification, it would not be permissible.

Senator **Hatch**. Am I correct that title VII of the Civil Rights Act of 1964 treats pregnancy classifications by employers in the dispensation of medical benefits as an illustration of discrimination on the basis of sex?

Professor **Freedman**. Yes; they treat as a form of sex discrimination, but they do not treat it as if it were a facial class.

Senator **Hatch**. Would you disagree with title VII on that point, then?

Professor **Freedman**. No; I do not.

Senator **Hatch**. OK.

Professor **Freedman**. The position of the dissenters in *Gilbert* and *Geduldig* is that pregnancy classifications must be reviewed with something other than minimal, toothless scrutiny. They have to have some kind of strict scrutiny. There is strict scrutiny of pregnancy classifications That is what title VII now means; that is what ERA requires.

The point that I am making about *Harris* which Professor Noonan disagrees with is that they used strict scrutiny in *Harris* under privacy, and that the same results on strict scrutiny are the same results on strict scrutiny, and I would point to the dissenters' opinion in *Harris* v. *McRae* in support of my position.

There is not a mention of a sex discrimination argument in there. In dissent, Brennan and Marshall both took the position in *Gilbert* and *Geduldig* that unique physical characteristics should be subject to some kind of more serious scrutiny, and yet they did not make a unique physical characteristics argument in *Harris* v. *McRae's* dissent.

Professor **Noonan**. Can I make one comment on why they did not? That was 4 years ago; they were still a minority. They had lost in *Geduldig*; they saved their breath. Why should they make an argument they had lost on in two cases?

Professor **Freedman**. They do it all the time.

Professor **Noonan**. But to speculate as to why they would not use a useless argument is very different. Now, they have got a majority.

Professor **Freedman**. But they lost on the poverty one, too, and they made that.

Professor **Noonan**. May I ask you one simple question? Did the Court in so many words, the majority opinion, say we are not dealing with a suspect class?

Professor **Freedman**. Yes.

Professor **Noonan**. All right.

Professor **Freedman**. They were talking about poverty at the time.

Professor **Noonan**. Right. Will not the reasoning change when they are dealing with a suspect class?

Professor **Freedman**. They will not be dealing with a suspect class. They will be dealing with strict scrutiny based on unique physical characteristics.

Professor **Noonan**. That is not a suspect class?

Professor **Freedman**. No.

Senator **Hatch**. Under the language of the ERA——

Professor **Freedman**. The ERA does not make sex a suspect class. It says it is not permissible to use sex classifications, and it says unique physical characteristic classifications are not sex classifications, but they are related to sex discrimination in such a way that they are subject to strict scrutiny.

Senator HATCH. Well, I hate to say it, but I believe that that is inconsistent with what every ERA proponent, who has spoken in the Congress, says about it. You may be right. I am not saying you are right. But you are in a distinct minority, among even proponents.

Professor FREEDMAN. Let me clarify why that confusion happens so often, and it does happen a lot and people use it in a loose phraseology because what "suspect class" has come to mean under the 14th amendment for race has been fatal in fact. The phrase that is used is it is scrutiny which is strict in form, fatal in fact. I think the Court has actually said that on occasion.

So it is the highest standard with which people are familiar and people use it to say we mean something more than intermediate scrutiny. But, in fact, strict scrutiny means a review in which the Government bears some burden of justification.

Under the equal rights amendment, facial classifications cannot be used; you cannot justify them. Facial classifications are not permissible; they cannot be used. Unique physical characteristics are subject to strict scrutiny.

Professor NOONAN. Now, would not pregnancy and abortion be subject to strict scrutiny?

Professor FREEDMAN. Yes, and strict scrutiny is also what is used under the due process clause and under the 14th amendment for abortion now.

Senator HATCH. In our first hearing Marna Tucker, a leading proponent for the equal rights amendment, said sex discrimination under the ERA would be treated as equivalent to race discrimination.

Now, you know, if that does not indicate that there is confusion on what the ERA means, I do not know what does.

Professor FREEDMAN. No.

Senator HATCH. She was the lead witness of ERA sponsors on this committee.

Professor FREEDMAN. It is a difference between a legal technicality about how the results are accomplished and what the results would be. The reason why suspect class is not the standard for sex discrimination for facial classification is because the history of race gives a special meaning to strict scrutiny about race and suspect class status about race.

The results of a 14th amendment case about race and the results in an equal rights amendment about a facial classification would parallel each other. It is not a disagreement.

Senator HATCH. I think it is. Do we have to write your Yale Law Review article into the statute to clarify it?

Professor FREEDMAN. If you look at the original legislative history, it does not say this makes sex a suspect class. The ERA is not an amendment to the 14th amendment; it is its own amendment.

The thing is it is beside the point in this context because we are talking about facial classifications. For unique physical characteristics, the standard is strict scrutiny. Unique physical characteristics are not the same as facial classifications.

Senator HATCH. Under the language of the equal rights amendment, would a pregnancy classification such as the Hyde amendment be subject to the standards of the unique physical characteristics exception that you are talking about?

Professor FREEDMAN. Yes, strict scrutiny would apply.

Senator HATCH. Where does that exception derive from?

Professor FREEDMAN. The whole unique physical characteristics argument was developed in the original legislative history without prior case precedent.

Senator HATCH. Actually, it was developed in your Yale Law Review article; was it not? It has no further basis; does it?

Professor FREEDMAN. Yes, which became legislative history, but as it happened the *Gilbert* dissenters——

Senator HATCH. It is "legislative history" except that no one seems to agree on what it means.

Professor FREEDMAN. It is an obvious fact about men and women that women have certain reproductive capacities and activities that men do not have. So it is not a question that you have to go far afield to think, what are we going to do about pregnancy classifications. It is not as though you have to make up the problem of pregnancy.

The problem of pregnancy is a difference between the sexes. The question is will it swallow the main rule of the amendment. So in the Yale article we talked about unique physical characteristics, and that is what the dissenters did in *Gilbert* and *Geduldig*, so now there is case law analogous to unique physical characteristics, although there was not at the time of the original legislative history.

Senator HATCH. Are there any other exceptions to what you and Professor Emerson describe as the "absolute" standard to be employed under the equal rights amendment?

Professor FREEDMAN. Wait a minute.

Senator HATCH. I am talking about the right to privacy, for example.

Professor FREEDMAN. I know, but that is facial classifications.

Senator HATCH. All right. That is your nomenclature.

Professor FREEDMAN. These are classifications based on unique physical characteristics. This is not an exception about facial classifications. Classifications based on pregnancy are not facial classifications; they are unique physical characteristics.

Senator HATCH. Do you have any comments about that, Professor Noonan?

Professor NOONAN. You know that this unique physical characteristic was something that the original authors, with commendable astuteness, dreamed up. Senator Bayh to some extent adopted it in his Senate report, but it has not stood up in the Supreme Court in the title VII cases.

I do not know really why we should spend a lot of time on it, except that we have the author of the idea. When I see that you yourself rejected it in the *General Electric* case, where you said pregnancy was not unique, it was shared—did you not say that, that an operation for pregnancy reached shared characteristics with other operations?

Professor FREEDMAN. Yes. I did not say that pregnancy was not a unique physical characteristic.

Professor **Noonan**. Just the operation?

Professor **Freedman**. I said that the concern of the employer in a disability scheme did not go to unique features of pregnancy. There are some features shared and some features not shared.

The employer does not care about the fact that pregnancy involves reproduction. The employer cares about employee disability; that is what Congress recognized in the Pregnancy Discrimination Act.

Professor **Noonan**. And then after you made that argument, did not Justice Brennan, whose position you endorse, say men have a reproductive system, women have a reproductive system; there are common categories?

Professor **Freedman**. They are common categories as they relate to an employer disability scheme. The whole point of strict scrutiny is you have to look at the classification in question that supposedly has to do with reproductive function, and ask does it have to do with reproductive function.

Professor **Noonan**. And what would be different about abortion?

Professor **Freedman**. The whole point about abortion and why there is so much debate about it is that abortion has to do with the reproductive function in a way that is not like anything else.

Professor **Noonan**. It ends in a person not having a child.

Professor **Freedman**. Right, or if a person does not have an abortion, the person goes ahead and has a child.

Professor **Noonan**. But as far as it is funded, it ends up in neutering the reproductive capacity and reducing the person to the many people who do not have children.

Professor **Freedman**. I do not think a woman who has an abortion is reduced to being a man.

Professor **Noonan**. In that respect, in the respect we are looking at, is that not true?

Professor **Freedman**. No.

Professor **Noonan**. You said in so many words in that brief that the reproductive process—the unique thing is that you have a baby.

Professor **Freedman**. Or do not have a baby. You have to deal with the fact that there could be a baby.

Professor **Noonan**. And abortion ends that possibility.

Professor **Freedman**. That is right, but it is not as if you never went through any process. It does not make you a man. One thing that is real clear to me is that people who have abortions do not end up being men. [Laughter.]

Professor **Noonan**. We are looking at shared characteristics at a particular point in time. Just as you pointed out, a woman is just like a man in getting some kind of medical operation in pregnancy. So in this one respect, she is not bearing a child.

Professor **Freedman**. Vis-a-vis the employer's concern. The employer's concern is with whether an employee should be compensated for expenses or for time lost from work because of disability. It does not make a difference whether employees are disabled because they are pregnant or they are disabled for some other reason.

This is what I was trying to clarify. There seemed to be a misunderstanding by some people that the unique physical characteristics doctrine was not what the dissent said in *Gilbert* and *Geduldig*, but rather what the majority said; in other words, no scrutiny at all.

And I was trying to clarify in that brief, and I think did clarify, and the dissent picked it up, that unique physical characteristic scrutiny means, that there has to be some scrutiny about whether the regulation is related to something unique about pregnancy. In a disability context it is not related to anything unique about pregnancy.

Senator **Hatch**. Professor, assume that the Congress decided in a Health and Human Services appropriation to fund research programs for every significant health program or disease with the exception of sickle cell anemia. As you know, sickle cell anemia is a disease that strikes predominantly black individuals.

Would you imagine that anyone could make an argument that such a denial violated the equal protection clause of the 14th amendment?

Professor **Freedman**. It would depend on why Congress had taken that action. You are asking me to assume that Congress did it for racial animus?

Senator **Hatch**. No.

Professor **Freedman**. I cannot imagine that.

Senator **Hatch**. Assume that the Congress did not, would not an argument still be made that it violated the equal protection clause? How would that illustration be any different from the abortion issue, in which Congress has chosen not to fund a medical procedure which exclusively affects women? You do not see any analogy?

Professor **Freedman**. First of all, I cannot imagine Congress doing that. No. 2, the issue on equal protection would depend in part on why they did it.

Senator **Hatch**. Yes.

Professor **Freedman**. Sure, somebody would argue that, but the only possible reason for Congress not to fund it—I mean, there might be a million reasons why they did not fund it. They might decide that it would not be productive research.

Senator **Hatch**. It may cost too much; they just do not want to pay for it. It sounds like you are endorsing an intent standard here by looking to motivation.

Professor **Freedman**. It would depend on the reason that Congress did it. If Congress did it out of racial animus, then they would be discriminating on the basis of race, but that is not the case in the abortion funding cases. They are not parallel.

The other thing that is not parallel is that there exists a body of constitutional law that deals with the abortion situation. There does not exist a body of law that deals with sickle cell anemia.

Senator **Hatch**. The Library of Congress recently prepared an extensive analysis of the ERA/abortion issue; I know you are familiar with that. It concluded, "If strict scrutiny is the standard applied, then the answer to the question of whether pregnancy classifications are sex-based classifications would seem to be affirmative."

Now, at least as I have interpreted you, you have said that strict scrutiny would be the appropriate standard even in the instance of classifications involving unique physical characteristics. Am I wrong in that?

Professor Freedman. No. I believe in strict scrutiny for those.

Senator Hatch. Well, the Library of Congress would conclude that the ERA would promote abortion funding. Do you disagree with that research?

Professor Freedman. They equated that unique physical characteristics with facial sex classifications, and I do not agree with that equation.

Senator Hatch. You seem to be the only one who has ever made this argument.

Professor Freedman. No. The Yale Law Journal article makes that argument and takes this position. It clearly differentiates between facial classifications and unique physical characteristics classifications. It says facial classifications are not permissible; it says unique physical characteristics classifications have to be closely scrutinized.

Senator Hatch. The only thing I am pointing out is that the Library of Congress analysts seem to misunderstand; Congressman Edwards seems to misunderstand, and Senators Tsongas and Packwood seem to misunderstand.

Professor Freedman. I do not think Representative Edwards misunderstands.

Senator Hatch. You do not think he misunderstands?

Professor Freedman. No. I agree that there is strict scrutiny of pregnancy classifications. I think that they are ignoring the effect of *Harris* v. *McRae* on telling us what strict scrutiny requires when it is applied.

Professor Noonan. Can I ask the professor one question?

Senator Hatch. Sure.

Professor Noonan. Why do you attach such importance to part one of *Harris* and ignore what the Court said in part two? They said we are not applying strict scrutiny, with the plain implication that it would be different that they were. Why did they say that?

Senator Hatch. That is the quote I read.

Professor Freedman. First of all, they were talking about poverty, not sex.

Professor Noonan. All right. Whatever they were talking about, they said they are not doing it by implication.

Professor Freedman. They did not even dignify the sex argument with a discussion.

Professor Noonan. Yes.

Professor Freedman. Second, if your argument were persuasive, I think the dissent, which believes in strict scrutiny for pregnancy classifications, would have adopted it.

Professor Noonan. But ERA was not in place. You kept telling us *Harris* talked about strict scrutiny. The Court says "we did not" in this part of the case.

Professor Freedman. It is uncontested that strict scrutiny is the standard of review for privacy violations.

Senator DeConcini. Mr. Chairman?

Senator Hatch. Yes?

Senator DeConcini. The witness, Professor Freedman, did write Congressman Edwards in response to the legal analysis of the impact of the proposed equal rights amendment, dated November 7. It is a lengthy letter and I would ask, if the chairman would not object, that it appear in the record.

Professor **Freedman**. Senator Hatch, I do not know if my prepared testimony has gotten into the record officially, and I just want to make sure it does.

Senator **Hatch**. Without objection, we will make sure it goes in immediately following your initial remarks.

Professor **Freedman**. Thank you.

Senator **Hatch**. Now, is it your view, Professor, that the Hyde amendment is a constitutional exercise of authority by the Congress?

Professor **Freedman**. I believe that that is the law of the Constitution, yes. The Supreme Court has said that is what the Constitution means, and they are the ultimate arbiters.

Senator **Hatch**. If that is so, you believe that Congress has the authority to restrict public funding of abortions for indigent women? Do you personally believe that?

Professor **Freedman**. I do not understand the question.

Senator **Hatch**. Well, let me say it again.

Professor **Freedman**. I mean, the Supreme Court has spoken about what the Constitution permits.

Senator **Hatch**. You are acknowledging that Congress has a right to pass the Hyde amendment as an exercise of its constitutional power. So the Congress does have the authority to restrict public funding for abortions for indigent women?

Professor **Freedman**. Is that not what it has already done?

Senator **Hatch**. Yes. So you are saying it does, then?

Professor **Freedman**. The Supreme Court has said they do, and the Supreme Court is the ultimate authority as to the meaning of the Constitution.

Senator **Hatch**. Would you anticipate any significant litigation directed to overturning the Hyde Amendment if the ERA is passed? Are you saying that it would have little or no chance of success?

Professor **Freedman**. I do not think the equal rights amendment will cause further litigation. I think as long as the Hyde amendment is in place, people who disagree with the Supreme Court's ruling will try to figure out ways to get it overturned. So I expect that at any point that they think that they can overturn it, they will bring cases trying to overturn it.

Senator **Hatch**. If I understand your testimony, you are saying they will not be successful in overturning it?

Professor **Freedman**. They will not be successful on the grounds of the ERA on overturning it. They may or may not succeed in changing the dimensions of the constitutional right of privacy.

As I understand it, it is the hope of those who oppose abortion that the Supreme Court will abandon the whole line of argument they took in *Roe* v. *Wade*. And I suspect that the question of whether the Supreme Court should change its mind, either to go further toward a choice position or further toward an antiabortion position, will continue to be litigated.

My point is that it will be litigated as a privacy matter; that the Court will decide it as a privacy matter, not that it will not be litigated. I think this country is going to be fighting one way or another about this issue for some time to come.

Senator HATCH. Then I take it you would disagree, then, with the Connecticut superior court judge in the judicial district of New Haven in the *Doe* v. *Maher* case, who stated in response to a challenge to a public funding restriction:

> The constitutional arguments that policy paragraph 275 violate a State's equal right amendment and equal protection clause have substantial merit. Inasmuch as this is an application for temporary injunction that requires a prompt determination, the Court finds that it must pass on these tempting and very persuasive arguments made by the plaintiffs and limit its discussion to due process analysis.

Do you agree with that?

Professor FREEDMAN. I did not follow the last part about due process analysis. If you are saying do I think that those are persuasive arguments, that is a prediction about whether they are persuasive to the Supreme Court.

Senator HATCH. Well, basically, he said that the argument that the State Hyde amendment violates the State ERA offered a very tempting and very persuasive argument.

Professor FREEDMAN. I think it is clear that it is not a very tempting and very persuasive argument to the U.S. Supreme Court, which is what I understand to be the subject of this hearing.

Senator HATCH. OK. In the 1976 Supreme Court decision of *Missouri* v. *Danforth,* the Court ruled that the husband of a pregnant woman did not have any veto right over the abortion decision of the spouse.

Now, given that the ERA is designed in so many areas of domestic relations to equalize the roles of husbands and wives, do you think the equal rights amendment would have any impact upon the *Danforth* decision and accord the husband greater rights in this area?

Indeed, I noted that this precise argument was recently made in the context of the Maryland State equal rights amendment. Would the ERA affect *Danforth?*

Professor FREEDMAN. No, I do not.

Senator HATCH. You do not.

Professor FREEDMAN. My reasons for that are that the reason why the husband does not have rights, in the *Danforth* reasoning, is because it is a constitutional right to privacy of the woman, and for the State to give the husband a say—if there is a husband and a wife, they cannot have a majority vote; either the woman decides or the husband decides.

If you give the husband a veto power, the State is delegating to the husband a power that, under the Supreme Court's interpretation in *Roe,* the Supreme Court says the State does not have. So they cannot give any third party the right to exercise it.

That analysis would continue to govern, so for privacy reasons it would continue to be the same law. Privacy analysis controls; privacy analysis says the husband does not have a right.

Senator HATCH. Do you have any comments on that, Professor?

Professor NOONAN. I think there would certainly be a serious argument and how it would come out, of course, would depend on how highly the Court valued the abortion right against the equal rights amendment. But it would certainly be a point of considerable substance that could reasonably be argued.

Senator HATCH. Sarah Weddington, one of the attorneys in the landmark *Roe* v. *Wade* decision, testified several years ago in opposition to the proposed antiabortion constitutional amendment that, "The proposed amendment would deny the ERA principle that women have a right to 'all choices'."

Do you agree or disagree with Ms. Weddington?

Professor FREEDMAN. Do I agree that it is an ERA principle that women have a right to abortion?

Senator HATCH. Yes.

Professor FREEDMAN. I think under our Constitution, it is a matter of the constitutional right to privacy whether women have a right to choose abortion or not.

Senator HATCH. Prof. Paul Freund, who, of course, has been one of the most distinguished constitutional scholars of the century, recently wrote on the abortion/ERA connection that, "By reinforcing the equal protection amendment, the ERA could have an effect on abortion funding."

Professor Noonan, do you agree with Professor Freund on that point?

Professor NOONAN. I do.

Senator HATCH. And you disagree, I take it?

Professor FREEDMAN. Yes. I think it will not have a practical effect. The point is the Supreme Court has a very powerful tool in privacy analysis. Now, if the Supreme Court wants to reach abortion funding, they can do it. That is what the dissenters said.

Those interpretations are available to them and if the Supreme Court is not doing it, I assume it is because the Supreme Court believes that there is some valid distinction between restrictions on funding in the Medicaid Program and other kinds of rules and regulations and criminal laws relating to abortion.

Now, if the Supreme Court is inclined to go further than it has gone in favor of women's rights to choose, they can use the privacy doctrine to do so, and if they do not, it must be because they think there is some distinction between funding regulations and other kinds of regulations.

The suggestion that somehow they are waiting for some additional constitutional power when they have articulated the right to privacy in very powerful terms—they do not need anything more. They have the power to make up their minds about what strict scrutiny requires.

Senator HATCH. During the House testimony on the ERA, AFL-CIO President Lane Kirkland described the ERA/abortion issue as a "substantial one." He stated that the AFL-CIO, "believed that Congress may and should provide authoritative guidance for the courts in those areas."

Do you agree with Mr. Kirkland in this matter?

Professor FREEDMAN. Well, I think I disagree with him about how substantial the issue is and whether the guidance that has already been given is clear. But to the extent he is saying that it should be clear, I think it should be clear.

Senator HATCH. OK.

Professor **Freedman**. I do not understand him to be advocating an amendment to the amendment. I do not understand that to be Mr. Kirkland's position, although I do not know.

Senator **Hatch**. I have interpreted that he is advocating more clarity than what Senators Tsongas and Packwood have given to us in the prior hearings.

In light of the fact that the great preponderance of feminist organizations argue that the Hyde amendment was unconstitutional under even the 14th amendment, is it not a virtual certainty that they will be back in court if the ERA is ratified arguing the inconsistency of Hyde and the ERA?

Professor **Freedman**. I think everybody is going to argue everything they can think of to argue on both sides of the issue for as long as they can get a court to hear them.

Senator **Hatch**. Then why should not the supporters of the Hyde amendment legitimately desire more assurance on this point than you and other ERA proponents seem willing to give them?

Professor **Freedman**. Well, I think that the legislative history is an adequate guide to interpretation of the amendment and Congress has full power over that. The question is not whether people should be clear; the question is what form that clarification should take. I think an amendment to the amendment has certain dangers which I have previously explained.

Senator **Hatch**. Let me inquire further about an illustration raised by Professor Noonan. It should not be long before we have perfected the technology to predict the sex of infants in the womb; once that is achieved, would it be permissible for a hospital funded publicly to perform such analysis for parents if the impact was a disproportionately high number of abortions of girls rather than boys?

What if the hospital indeed is aware that a particular family is desirous of aborting females but not males? Would the ERA affect such a situation at all?

Professor **Freedman**. It seems to me that it would be decided under the constitutional right to privacy. It is a straight question about the scope——

Senator **Hatch**. So they would have the unrestricted right to do it.

Professor **Freedman**. No, I am not saying they would have that right. I am saying it would be decided on privacy grounds.

Senator **Hatch**. Which according to *Roe* basically comes down in favor of the abortion right

Professor **Freedman**. Not necessarily. It seems to me the Supreme Court has been going through a process of talking about what kinds of State interests would be sufficient to justify restrictions on abortion, and that that is a State interest that they have not yet discussed and I do not know what they would do. But I think they would decide it on the basis of a privacy, strict scrutiny analysis.

Senator **Hatch**. Professor Noonan, what do you have to say on that?

Professor **Noonan**. It seems rather surprising, where something would be clearly discriminating against one's sex, that the ERA would not have an obvious application. I cannot quite understand why this wonderful constitutional amendment that we are talking about, once in place, is going to be treated as irrelevant by our Supreme Court.

We get constantly the answer as to what it has done in the past. What we are interested in is what it will do with the ERA in place, and we are told again and again it just will not use it.

Senator HATCH. Professor Noonan, you have raised the issue of tax exemptions for educational institutions, and you have responded to a degree, Professor Freedman. Can we as a nation continue to allow tax exemptions for institutions engaging in sex discrimination? Assume that we decide that a restrictive policy on abortion is tantamount to sex discrimination?

Professor FREEDMAN. My understanding is that in the *Bob Jones* decision, the Supreme Court said that it is up to Congress what the tax exemption policy should be. Congress has plenary power over the area of taxation and they can grant and withhold tax exemptions as they see fit.

Senator HATCH. You are saying Congress can do whatever——

Professor FREEDMAN. They cannot do anything that they could possibly want. I suppose if they said we are going to give tax exemptions to men but not women, there would be some constitutional problems with that. But in the particular example you are giving, I do not see that it would be outside Congress' power to decide what to do, particularly since in many of those instances there are first amendment conscience issues that might be raised.

Professor NOONAN. May I?

Senator HATCH. Sure.

Professor NOONAN. I am sure it was inadvertent when you were first commenting on *Bob Jones,* Professor Freedman, but I believe you actually did say that the Court in there said that this is not a constitutional issue. The Court did not get to the Constitution. The Court never gets to the Constitution if it has got a statute.

What I think you meant to say was that it was dealing with a statute. Of course, we agree on that. But then in dealing with the statute, it read in these requirements of a public charity that it pretty much invented out of the air and it did not pay any attention to what Congress had said. It had its own views about what the common community conscience was.

So the real question is how could you confine a Court that had a strong view based on a constitutional text of what the common community conscience required. It is not going to be so easy to keep those tax exemptions in place when you have got the ERA there.

Professor FREEDMAN. First of all, they look to the Constitution as a guide to congressional intent, and if Congress had manifested a clear, contrary intent, I believe they would have adhered to it. And I do not agree with you that Congress had manifested a clear, contrary intent.

Second, Congress is free to manifest its intent perfectly clearly. If Congress disagrees with the *Bob Jones* opinion, they can reverse it in a minute. I cannot imagine a court reaching the result that you hypothesize because I do not think race discrimination and discrimination based on abortion would be treated as analogous by a court.

But were a court to do that, Congress would be able to repudiate it immediately. It is not something that would be beyond the power of Congress to deal with.

Professor **Noonan**. You are an optimist from my perspective, but I should think a pessimist from the point of view of many of your supporters.

Senator **Hatch**. Professor Freedman, do you believe that the States' interest in restricting or limiting or prohibiting abortion ever rises to the level of being a compelling interest?

Professor **Freedman**. As a constitutional matter?

Senator **Hatch**. Right.

Professor **Freedman**. I think the Supreme Court is quite clear that it does not.

Senator **Hatch**. A State's interest cannot be compelling?

Professor **Freedman**. No. As a constitutional matter, when they are applying strict scrutiny, they do not think prohibiting abortions is a compelling State interest during the first two trimesters of pregnancy.

Senator **Hatch**. What would be your own personal opinion?

Professor **Freedman**. My own personal opinion?

Senator **Hatch**. What would be your own personal opinion as a law professor?

Professor **Freedman**. It seems to me when the Supreme Court has taken a clear position about what the Constitution requires, that is what the Constitution requires. That is what it means to have the Supreme Court decide it.

Senator **Hatch**. To the extent that it is never a compelling State interest, as opposed to what *Roe* v. *Wade* termed an important and legitimate one.

Professor **Freedman**. Are you saying do I agree that there should be a constitutional right to privacy that protects a woman's right to choose in the first trimester?

Senator **Hatch**. I am sorry?

Professor **Freedman**. Are you asking me if I believe there should be a constitutional right to choose?

Senator **Hatch**. I am asking if the States' interest in restricting or limiting or prohibiting abortion could ever rise, in your mind, to the level of a compelling interest.

Professor **Freedman**. If you are asking me to interpret Supreme Court precedent, I do not think it would.

Senator **Hatch**. I am not asking you that. I am asking you what you believe personally. What is your personal belief as to where it should be?

We all know what the Supreme Court says now.

Professor **Freedman**. No, I do not think it is a compelling state interest in the first trimester.

Senator **Hatch**. OK.

Professor **Freedman**. I would not advocate that interpretation of the Constitution.

Senator **Hatch**. On page 901 of your Yale Law Journal article, you state that, "It is impossible to spell out in advance the precise boundaries that the courts will eventually fix in accommodating the ERA and the right to privacy."

Now, despite that statement, you seem to be relatively certain today about the impact of the ERA upon one aspect of that right to privacy; that is, the right to an abortion. Now, has something solidified your view on this matter over the past few years?

Professor **Freedman**. No. In the passage that you are talking about, the article is speaking about the constitutional right to privacy as it protects sex segregation of facilities involving disrobing, and there is an argument that the right to privacy and the ERA have conflicting demands in that area.

We are here talking about an area in which both the equal rights amendment and the right to privacy both require strict scrutiny, so they are different situations. One of the two examples has to do with a potential conflict between the right to privacy and the ERA, where they must be harmonized.

The area we are talking about today has to do with where both constitutional doctrines mandate strict scrutiny of the same subject. So it is a different kind of relationship between the two different constitutional provisions.

I do not know how much longer you are planning——

Senator **Hatch**. We only have a couple of more minutes. I am going to finish when I said I would.

Your statements on the question of the disparate impact standard seem to me to be at variance with some of your earlier statements on the issue. In your book, "Women's Rights and the Law," on page 18 you argue that the Supreme Court's holding in *Washington* v. *Davis* would not be applicable to the ERA.

Are you suggesting to this committee that sex classifications are to be judged by an even more rigorous standard than racial classifications under the Constitution. In other words, that women could have challenged the police exams in the *Washington* v. *Davis* situation as violative of the equal protection clause even though blacks were unable to do so?

Professor **Freedman**. Let me just get clear. Are you talking about neutral rules with a disparate impact or facial classifications?

Senator **Hatch**. Neutral rules with a disparate impact.

Professor **Freedman**. OK. I think the concern with neutral rules with a disparate impact—the Supreme Court's doctrine in *Washington* v. *Davis* manifests a clear position that disparate impact alone is not enough.

It is my position, which I stated before the Edwards committee, that under the equal rights amendment, disparate impact alone is not enough. The question is, is there an association between the traditional patterns of discrimination on the basis of race or sex. In the *Washington* v. *Davis* context, they said there was not a sufficient connection.

I would have to know the specific facts about what was alleged about the police exams to predict a concrete result. But I would suggest that as with race, disparate impact alone is not enough; you have to prove something in addition. And in my Edwards testimony, I spelled out what that "in addition" is for the ERA, in my opinion.

Senator **Hatch**. I only have 3 more minutes to go here and I would like to just ask you a few other questions while you are here with regard to an array of laws as they would be affected by the equal rights amendment.

There is no question in my mind that you are an extremely intelligent and sincere individual; there is also no question in my mind about your sincere commitment to the equal rights amendment.

But I have to be honest. If you look at the sum and substance of your writings on the equal rights amendment, I think that they capture well some of the things that I consider to be wrong with the equal rights amendment. Maybe I am wrong, too, but let me just ask you as quickly as I can these few questions.

In your prior writings, you have indicated that veterans' benefits would be called into question under the equal rights amendment. Am I right?

Professor **FREEDMAN**. Yes. I think the *Feeney* decision would be reversed by the equal rights amendment.

Senator **HATCH**. OK. You have also claimed that high school and collegiate athletic policies would be overhauled to accommodate the equal rights amendment. Am I misstating that?

Professor **FREEDMAN**. I am not sure exactly what you are referring to. You have to give me some more concrete examples.

Senator **HATCH**. Well, do you not agree in general that high school athletics and collegiate athletics will——

Professor **FREEDMAN**. I think that the equal rights amendment requires nondiscrimination in high school athletics.

Senator **HATCH**. That could have a dramatic impact on present high school and collegiate athletic standards and procedures.

Professor **FREEDMAN**. Well, a lot of the changes have already begun under title IX. For example, in Pennsylvania we already have some State equal rights amendment changes in athletics which have been extremely beneficial and have allowed girls to compete in a wide range of sports they were never allowed to before, and increased funding for women's athletics. It has been extremely desirable, so I think a lot of those changes are already underway in some States.

But I certainly think to the extent that there remains discrimination in athletics, it is very important that the equal rights amendment have that effect.

Senator **HATCH**. You have also indicated that insurance practices would have to be radically changed. Do you still hold that position?

Professor **FREEDMAN**. Yes. There are a number of insurance practices which violate the ERA.

Senator **HATCH**. Will major changes have to take place in such programs as Social Security and ERISA?

Professor **FREEDMAN**. Yes. I am not sure of the usefulness of going into all these other areas because it is in such vague terms.

Senator **HATCH**. You have indicated that domestic relations laws, including fault-based divorce laws, would have to be radically revamped. Am I right on that?

Professor **FREEDMAN**. As you say, I have written a lot on the subject. I suppose there is some error that I may have made here or there, but I am not abjuring the things I have said.

Senator **DECONCINI**. Would the chairman yield?

Senator **HATCH**. Sure.

Senator **DeConcini**. Since the chairman is about ready to finish with this witness, I would like the record to show clearly that we have discussed a number of questions and issues here in great detail. The chairman has been most articulate with piercing questions and inquiry into the details of the issue.

But Professor Freedman's testimony has been very clear on a number of questions. One, will the adoption of the ERA have any impact on abortion policy. She has said no, with clear examples.

No. 2, will the ERA reinforce or supplement the theory of abortion rights established by the Supreme Court in the abortion cases? She said "No."

Will the ERA expand abortion rights already delineated by the abortion cases? She said "No."

Will the ERA create new abortion rights? She said "No."

Will the ERA have any impact upon the Federal, State, or local limitations of the public funding of abortion? Her response was clearly "No."

Would the ERA overrule the Hyde amendment? She has said "No" four or five times.

Would the ERA lead to more abortion on demand? She has said "No" several times.

Will the ERA render the rights to abortion absolute during the third trimester of pregnancy? She has said "No."

Will the ERA have any impact on conscience clauses that many hospitals have adopted? She has also answered that several times in the negative.

Will the ERA result in people being forced to perform or assist in abortion operations, or else be subject to penalties? She explained three or four times that it would not.

Thank you, Mr. Chairman.

Senator **Hatch**. Thank you, Senator DeConcini.

Let me just ask four or five short questions while we are here so I can get them on the record.

Professor **Freedman**. Senator Hatch, I am going to have to take a break, at a minimum. I mean, I really physically——

Senator **DeConcini**. Mr. Chairman, the witness has been here since 9:30.

Professor **Freedman**. I addressed some of the questions you have raised in my testimony before the House, and perhaps you would like to make part of the record the testimony I submitted there.

Senator **Hatch**. We will recess the hearing with regard to you so you can go.

In any event, I understand that you need to go, so we will excuse you. I want to ask some followup questions of Professor Noonan. We thank you very much for being here today.

Professor **Freedman**. Do you want to make my testimony before the House a part of the record? It does address domestic relations.

Senator **Hatch**. Sure, we will be glad to do that here, although it is already a part of the record over there.

Professor **Freedman**. It deals with some of those issues that you raised.

Senator **Hatch**. Yes; that will be fine. We will be happy to do that. We will make that, without objection, a part of the record.

[The material referred to follows:]

STATEMENT OF

ANN E. FREEDMAN, ASSOCIATE PROFESSOR OF LAW,
RUTGERS LAW SCHOOL, CAMDEN,

BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
OF THE HOUSE JUDICIARY COMMITTEE

CONCERNING H. J. RES 1, THE EQUAL RIGHTS AMENDMENT,

NOVEMBER 3, 1983

It is a pleasure to appear today to discuss the constitutional implications of the equal rights amendment. The addition of this amendment to our constitution will provide the nationally uniform foundation necessary to protect women's basic rights to equality before the law. Women will henceforward be protected from the consequences of self-fulfilling assumptions about women's capacities and proper roles, as well as from gaps in existing antidiscrimination laws and the vagaries of changing administrations and short term political calculations. Moreover, because the ERA will provide a stimulus to legislators and officials at all levels of government to review their own laws and practices with a view to bringing them into conformity with equal rights principles, these benefits to womn will be achieved without compromising local needs and preferences.

I share Professor Emerson's belief that the basic analysis set forth in the 1971 Yale Law Journal[1] article which we co-authored remains sound, and that the sex discrimination decisions rendered by the Supreme Court in the intervening years have provided further dramatic evidence of the limitations of equal protection analysis as a tool for promoting equality between the sexes. Since Professor Emerson has described for the committee both the parameters of existing Supreme Court doctrine and the basic legal structure of the equal rights amendment, I will focus my testimony on three areas which I believe are of particular importance.

As Professor Emerson has explained, under the ERA, the government is prohibited from classifying on the basis of sex, except in those narrow circumstances where such classifications are used to protect the constitutional right to privacy or to permit past sex discrimination to be remedied. Since such classifications are otherwise always too broad or too narrow, including or excluding persons simply because of an accident of birth, the government must instead classify on the basis of the trait or function it seeks to affect, control or reward. Although the Supreme Court has interpreted the equal protection clause to invalidate sex classifications in some instances, there are still significant areas in which the equal protection clause condones the use of sex explicit classifications that discriminate against women. Three extremely important substantive areas in which the ERA would dictate different results than the equal protection clause are sex discrimination in the military, sex segregation in public schools, and overgeneralizations about individuals based on average physical differences between the sexes.

As previous witnesses before this committee have explained in some detail, the military is the single largest employer and provider of education and training in the nation, and yet it is, for all practical purposes, exempt from laws prohibiting sex discrimination. The exclusion of women from the military has deprived women of that employment and training and of lifelong benefits derived from military service. More importantly, women have been systematically denied full participation in political life, including decisions about the crucial issues of war and peace, on the erroneous premise that only men bear the burdens of "protecting" the country and the conclusion that, therefore, men alone are both entitled and qualified to serve as our political leaders. Under the ERA, neither sex discrimination in the military nor the devaluation of women's rights as citizens associated with that discrimination would continue.

As a Pennsylvanian, I am particularly aware of the importance of the ERA as a tool to combat sex discrimination in education. Legislative, administrative and judicial decisions under our state ERA have together resulted in dramatic increases in athletic and vocational opportunities for women and girls. The ERA also served as one basis of a court decision[2] ordering the admission of girls to Central High School, Philadelphia's prestigious all-male public high school, which is nationally known for its academic excellence and tradition of leadership. The latter decision is especially interesting since the U. S. Supreme Court had previously affirmed by an equally divided vote a lower court ruling[3] that the exclusion of girls from Central did not violate the equal protection clause of the Fourteenth Amendment.

Another critical feature of the ERA is its firm rejection of biological determinism. The ERA requires women and men to be judged as individuals and not on the basis of sex classifications based on stereotyped preconceptions about physical differences between women and men. In enacting Title IX of the Education Amendments of 1972, Congress recognized the importance of this idea when it permitted girls with superior athletic ability to compete on boys teams rather than denying individual girls equal opportunity on the basis of stereotypes about the average characteristics of females. At the same time, because of the need for affirmative action to overcome historical discrimination against women in athletics , Title IX permits the maintenance of all-female teams where necessary to guarantee equal athletic opportunity to both sexes. Similarly, under the ERA the government could not exclude all women from jobs requiring physical strength because some are not strong enough to perform the work, but would instead be required to specify the Vstrength needed to perform the job and judge candidates according to ability. For example, fire and police departments have traditionally excluded all women from jobs as police officers and fire fighters on the grounds of women's smaller average size and more limited upper body strength. The ERA would require that sex classifications be replaced with individual strength testing, as is now done for male candidates, and also, that the tests used be demonstrably relevant to skills and tasks actually performed on the jobs in question. To give another example, the ERA would reverse *Parham v. Hughes*[4], in which the Supreme Court ruled that Georgia could deny a father the right to sue for the wrongful death of his young son on the basis of average differences between unwed fathers and unwed mothers (as well as legal differences created by the Georgia legislature itself), despite the fact that Lemuel Parham, the father in question, had supported his son and maintained close ties to him during his son's lifetime. The ERA requires legislatures to classify on the basis of actual relationships between parents and children, not a vast overclassification based on average differences between biological mothers and fathers.

The ERA also requires strict scrutiny of classifications based on physical characteristics unique to one sex to assure that such classifications do not undermine the equality of the sexes. To treat people differently on account of characteristics unique to one sex is to treat them differently on account of their sex. Although such classifications are not prohibited outright, because there are a limited number of circumstances in which their use is justified, the state would bear the burden of demonstrating that such classifications are necessary and the reasons for them compelling. The dissent of Justice Brennan in Geduldig v. Aiello[5] illustrates the approach contemplated by the ERA. Unlike the Supreme Court, Congress has recognized the importance to working women of equal treatment of pregnancy-related disabilities and rejected stereotyped characterizations of pregnant workers by passing the Pregnancy Discrimination Act of 1978. The ERA would provide a constitutional foundation for the protection of women from governmental discrimination based on such stereotypes.

Another crucial aspect of the ERA is the insistence that government policies, practices or laws that classify on some neutral basis but that have a disproportionate negative effect on one sex only are under certain circumstances prohibited. This principle is consistent with the constitutional concerns underlyiing legal doctrine developed in applying the equal protection clause to claims of racial discrimination. It reflects however the application of those concerns to the different phenomenon of sex inequality prohibited by the ERA.

In Washington v. Davis[6], the Supreme Court expressed concern that strict constitutional scrutiny of all official conduct that has a disproportionate racial impact would result in judges supervising and in many cases invalidating a wide range of public programs. To avoid this result, the court ruled that official conduct is not unconstitutional solely because it has a racially disparate impact. Similarly, under the ERA, disparate impact on women would not alone trigger heightened constitutional review or invalidation of challenged programs. At the same time the ERA would require the recognition that the very stereotypes, assumptions, generalizations, and habitual views of certain activities as normally male or female that result in facial discrimination against women may also lead to discriminatory neutral rules. Therefore strict judicial scrutiny under the ERA would be required if a neutral rule that has a disparate impact on members of one sex is traceable to and reinforces, or perpetuates, discriminatory patterns similar to those associated with facial discrimination.

Many of the misconceptions and stereotypes that produce sex discriminatory neutral rules have been recognized and condemned by the Supreme Court in recent decisions under the equal protection clause invalidating facially discriminatory sex classifications. These include "the role typing society has long imposed" on on women[7], particularly the idea that the "female is destined solely for the home and rearing of the family" and not "for the marketplace and the world of ideas"[8], and "assumptions that women are the weaker sex or are more likely to be childrearers or dependents"[9]; the invidious relegation of classes of women "to inferior legal status without regard to the actual capabilities" of individual women"[10]; the "nineteenth century presumption that females are inferior to males"[11]; and the willingness to create gender-based hierarchies that keep women "in a stereotypic and predefined place" and grant men more responsible and remunerative positions.[12]. Others that have been identified by state legislators and judges in implementing state equal rights amendments, as products of conventional thinking about women that is inconsistent with a commitment to sex equality, include the devaluation of homemakers' contributions to marriage and negative assumptions about women's physical capabilities (resulting, for example, in women's exclusion from certain jobs and from athletics).

A number of discriminatory neutral rules are virtually accidental by-products of such conventional ways of thinking, a habit of concentrating on experiences, skills and attributes common to men but unusual among women when making rules for stereotypically male activities, and on experiences, skills and attributes common to women but unusual for men when making rules for stereotypically female activities. For example, the idea that women are physically weak gives rise in some contexts to rules excluding women from traditionally male jobs. In other contexts, a habitual way of viewing certain jobs as normally male leads to height and weight standards that exclude most women from consideration for such jobs and that have no relationship to the requirements of the job, or leads to physical strength tests that serve to exclude disproportionate numbers of women but that test skills in fact irrelevant to the jobs in question. Similarly, an exclusive focus on the female homemaker/ male breadwinner model of marriage generates both facially discriminatory rules (e.g. exempting women from jury duty; providing alimony for dependent ex-wives but not for dependent ex-husbands); and neutral rules with a disparate impact (e.g., providing jobs or job training only for the "primary breadwinner," usually the male because of women's lower average earnings; or enacting nepotism rules that encourage the discharge of the lower status member of the couple, usually the woman).

This understanding of the nature of sex discrimination offending the constitutional principles of equality, and the concern — as under the equal protection clause — to balance a commitment to the eradication of inequality with a proper deference to and respect for the legislative and administrative process, generate the principles that govern in ERA challenges to neutral action that has a disparate impact on females or males. As under the equal protection clause, evidence of disparate impact must be supplemented by additional evidence to connect that impact to patterns of discrimination against the affected group. Without such evidence, judicial review would be conducted under the rational basis test now applied under the equal protection clause to classifications not affecting a suspect class or a fundamental interest. Thus, for example, if the progressive income tax were challenged on the ground that it placed a greater financial burden on men than on women because of men's higher average incomes, the plaintiff would not be entitled to heightened judicial scrutiny because the disparate impact of the income tax on men is not the product of habit or stereotypical ways of thinking about the sexes. Moreover, it does not perpetuate sex based hierarchies but in fact to some degree ameliorates them. On the other hand, a permanent and absolute preference in civil service jobs for veterans with a severe disparate impact on women, such as that challenged in Feeney[13] would be subject to strict scrutiny and the government would then bear a heavy burden of justification. In contrast to the income tax, the Feeney-type provision is associated with a stereotypical attitude toward women workers and does perpetuate traditional sexual hierarchies in public employment, assigning women to low echelon traditionally female jobs while reserving high level jobs to men.

Of course, even where heightened scrutiny is triggered, the challenged rule would not necessarily be invalidated. Whether the statute is upheld or struck down would depend on traditional inquiries concerning the severity of the impact upon the group adversely affected, the importance of the statutory purpose, and the necessity of achieving it in the particular way chosen by the legislature. The availability of less discriminatory alternatives would be a key inquiry. The dissent's analysis of the veteran's preference statute in Feeney illustrates the approach required by the ERA.

This treatment of disparate impact claims under the ERA, while responsive to the particular nature of the phenomenon of sex discrimination, is anchored in the same constitutional concerns as the equality principles fundamental to the equal protection clause. For this reason, in those rare situations in which the same neutral rule has a disparate impact both on members of a suspect class and on members of one sex in ways linked to traditional patterns of racial and sexual disadvantage, thus giving rise to simultaneous review under the equal protection clause and the equal rights amendment, the outcome under both amendments would be the same. There is both an equivalent need to avoid discriminatory impact on minorities and women and at the same time the government interests supporting the maintenance of the rule would be the same in both contexts.

The domestic relations area in particular contains numerous examples of facially sex neutral rules with a severely detrimental impact on women and which would be subject to heightened scrutiny under the ERA. This committee has previously heard testimony about the harm caused to homemakers by ostensibly "neutral" laws and practices which deny dependent spouses whose marriages have ended in divorce the means with which to support themselves and their children. The ERA would require an end to the prevalent practice of discounting or entirely disregarding homemakers' contributions to their marriages and of failing to evaluate accurately the post-divorce needs of dependent spouses and children. Among the laws that that the ERA would subject to strict scrutiny are rules setting an arbitrary limit on spousal and child support of one-quarter to one-third of the provider's salary and methods of calculating child support obligations that omit the value of a custodial parent's continuing contributions in the form of child care and housework. The ERA would also encourage adoption of effective support enforcement mechanisms such as wage assignment and income withholding. Likewise, the ERA would call into question fault-based standards for the award of alimony that are used to decrease the amount of alimony awarded or bar it entirely when the dependent spouse is found at fault but which do not increase the amount awarded when the provider spouse is found at fault. Laws which preclude post-divorce support except in cases of extreme financial need, for spouses who are physically or mentally incapacitated, or for very brief periods of time[14] would also be subject to review and revision under the ERA because in cases where the couple has acquired little property such laws discount the dependent spouse's contributions both to the marriage and to the career of the provider spouse.

New Jersey's probate code provides some perhaps less well-known examples of laws which are facially sex-neutral but which can have a devastating effect on widowed homemakers. I have chosen to discuss these examples in some detail both because they are particularly egregious and also because the laws of all states contain a variety of specific laws whose impact on women is equally severe despite their apparently sex-neutral design. The ERA will provide the needed impetus to state legislatures throughout the country to review such statutes and eliminate provisions such as these which harm women and have little or no positive justification. Because of the disparate impact of such laws on women and their association with stereotyped devaluations of women's contributions to marriage, laws of this sort that are not revised will be subject to strict scrutiny under the ERA.

I can best explain the operation of New Jersey's probate rules through a case study of a woman I'll call Mary Smith, who is based on a composite of various women's experiences. Mary lived with her husband John in Collingswood for twenty-five years and raised four children. In 1980, John went through a mid-life crisis and fell in love with another woman, Barbara Jones. After a year, he and Mary agreed to separate but Mary did not file for divorce because her religious principles forbade it. Mary went to work as a secretary to support herself. Without Mary's knowledge, John wrote a new will leaving everything to Barbara, including John and Mary's home, in which Mary still resides. The house, which was purchased during the marriage with money saved from John's wages, is titled in John's name. Last summer, John died. John's executor has refused to pay Mary her statutory entitlement of one-third of John's estate, which has a total value of $90,000, because in New Jersey, if the spouses are separated at the time of one spouse's death and there is a ground for divorce or annulment outstanding, in favor either of the decedent or of the surviving spouse, the forced share need not be paid.[15] Since the grounds for divorce and annulment are quite extensive, including cessation of sexual relations (desertion) and voluntary separation for 18 months, Mary and a significant number of other surviving spouses are affected by this provision.

Even if Mary had continued to live with John until his death, and his executor did not assert either John's adultery or the couple's separation as a reason to deny Mary her share, she would still have been denied an elective share in his estate. Mary had separate property worth $30,000 which she had inherited from her mother in 1982, and New Jersey counts one spouse's separate property as satisfaction of that spouse's rights to a forced share in the other spouses estate.[16] Nor did New Jersey give Mary any legal right after John's death to a share in the marital residence she shared with John for twenty-five years because the house was not jointly titled and New Jersey has no homestead law, which would permit a surviving spouse to stay in the matrimonial home for the duration of that spouse's life. Finally, New Jersey exempts life insurance, accident insurance, pensions and joint annuities from the definition of the augmented estate, on the basis of which the one-third elective share is calculated.[17] Thus, if John had used some of his money to buy life insurance naming Barbara as the beneficiary, or had purchased a joint annuity with her, or if a substantial part of his estate had consisted of pension benefits, Mary's elective share would to that extent have been reduced.

Social Security and employment-related pensions are two other areas which contain a number of rules and policies which, though articulated in sex-neutral language, are nonetheless extremely sex discriminatory in practice, because they fail to respond to the economic realities of the lives of the majority of women. The life patterns of most women differ from those of the typical man both because of sex discrimination in the labor market and because women have traditionally assumed the lion's share of responsibility for housework and childrearing. As a result, women are more likely to have interruptions in their labor force participation, to work at lower wage jobs, and to work part-time or part-year. Yet ERISA permits employers to exclude from coverage employees under 25 years of age, although the years between 18 and 25 show the highest rate of labor force participation among women. ERISA also tolerates a ten-year vesting requirement and permits employers to exclude persons who work less than 1000 hours a year from coverage. ERISA also fails adequately to address the problems of divorced homemakers because it does not require employers to include survivor's benefits for former spouses of the wageearner.

The failure of the Social Security Act to take account of the life situations of most women, who combine homemaking and paid employment over the course of their lifetimes, is also striking. Two features notable in this regard are the lack of recognition of the economic contribution made by homemakers and the forty quarter threshold. The first lowers benefits available to women who have spent time as full-time homemakers and the second prevents many such women from qualifying for workers' benefits, which are far more advantageous than the dependent's benefits for which they may be eligible. Because of the disparate effect of the Social Security Act and ERISA on women, and their association with sex discriminatory attitudes and practices, the ERA will require Congress to review these provisions and substitute others that treat women more fairly.

Meaningful constitutional protection for equal rights for women is an idea whose time has come. Contrary to the assertions of its opponents, I believe the evidence shows that the ERA will be a major force for the elimination of sex discrimination and the improvement of the lives of all women. Therefore I urge this committee and the Congress to act favorably and promptly upon H.J. Res. 1.

Footnotes

1. Brown, Emerson, Falk & Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 *Yale L.J.* 871 (1971).
2. Newberg v. Board of Public Education, No. 5822, August Term 1982 (Court of Common Pleas, Phila. Co., Sept. 28, 1983).
3. Vorchheimer v. School District of Philadelphia, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 430 U.S. 703 (1977).
4. 441 U.S. 347 (1979).
5. 417 U.S. 484, 497 (1974) (Brennan, J., dissenting).
6. 426 U.S. 229 (1976).
7. Stanton v. Stanton, 421 U.S. 7, 15 (1975).
8. *Id*. at 14-15.
9. Califano v. Webster, 430 U.S. 313, 317 (1977).
10. Frontiero v. Richardson, 411 U.S. 677, 687 (1973).
11. Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J., concurring in the judgment).
12. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 285 (1979) (Marshall, J., dissenting).
13. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979).
14. *See*, *e.g*., Indiana Code, Title 31, § 31-1-11.5-9(c).
15. New Jersey Stat. Ann. 3B:8-1.
16. New Jersey Stat. Ann. 3B:8-18.
17. New Jersey Stat. Ann. 3B:8-5.

Senator **DeConcini**. Mr. Chairman, may I just thank Professor Freedman?

Professor Freedman, I presume you would be more than happy to respond to the Senator's questions in writing, too.

Professor **Freedman**. Yes.

Senator **DeConcini**. Fine, thank you.

Senator **Hatch**. If you want to take a break while I talk to Professor Noonan, please feel free to do so.

Professor **Freedman**. Definitely, at the moment, I have to walk out of this room.

Senator **Hatch**. I understand. You have been very helpful to the committee today.

Professor Noonan, I have been very interested in some of the answers that Professor Freedman has given, particularly in the area of title VII and of the suspect classifications. Now, would you care to comment about the testimony she has given here today in those two areas or anything else, for that matter?

Professor **Noonan**. It seems to me that we have all understood that when we are talking about the interpretation of a new constitutional amendment, what we have to guide us is essentially what the Court has done in very similar situations. So I think our precedents are awfully valuable to us.

I have not frankly heard a word of reasoning this morning as to why the title VII vision of what constitutes sex discrimination would not be taken right over in block in the ERA. I have heard this theory that was thought up in 1971, but it does not bear much relevance to what the 1983 decisions of the Court say.

So I see the Court asking: Is this discrimination because this person is a woman, and it is an awfully easy answer. Yes, but for being a woman, she would be entitled to medical coverage under medicaid or whatever the other funding program was.

I am quite confident that as long as those precedents are in place, that is the way it is going to go. Now, we cannot exclude that the Supreme Court would reverse itself again, but as far as we know from the precedents, this is what would happen.

Now, the other thing that struck me very strongly in the testimony we have heard is that it all was premised on the assumption that the privacy doctrine that the Court made up in *Roe* v. *Wade* would continue to attract the allegiance of a majority of the Court.

Now, you know, Mr. Chairman, and we all know that that doctrine has been severely criticized by constitutional experts of almost every shade of opinion. And there is good reason to think that it is a crumbling doctrine.

We know that Justice Powell himself, actually, in the *Akron* case last year said that Sandra O'Connor was no longer adhering to it; that she was sabotaging it or she had secretly rejected it. We have also seen the Harvard Law Review, in its very interesting review of the 1983 term, say in so many words that the Court is subtly eroding the abortion rights of women, backing away.

With that process going on and with every reason for the abortion camp to be pretty alarmed about the status of the privacy doctrine, I cannot see why we have heard testimony as to what would happen if the privacy doctrine were still a robust and viable doctrine.

I think we have got to assume that it is going down the drain, and then the question will be, without this powerful tool that we have heard about, what will the proabortion advocates and judges do. And we will be handing them an even more powerful tool if we put the ERA in, when it is such an easy step to say abortion discrimination equals sex discrimination.

As I indicated in my written testimony, I came to this with an open mind. But I really think ERA is legitimately equated with equal rights for abortion. That is really the equation I see written before us by the Supreme Court.

Senator HATCH. Have you heard of any theory of suspect classifications similar to the one that Professor Freedman gave us here today?

Professor NOONAN. Well, I have followed Professor Freedman's interpretations and I think that it is fair to say that her interpretations are somewhat focused depending on the forum she is arguing in.

I think in this particular area that she has made her specialty, the unique physical characteristic, subject to strict scrutiny—when she had a pregnancy case, when she had the *General Electric* case and was arguing it, she found a way of showing that pregnancy itself was not a unique physical characteristic; that there were features of it that were shared with other operations.

So far as I can see, anything we could think of would easily be classified as something that is actually a sex discrimination, not a unique physical characteristic discrimination.

I think the unique physical characteristic exception vanishes whenever the classifier wants to invalidate the rule. And I think subject to strict scrutiny, pregnancy vanishes as a unique physical characteristic, becomes subject to strict scrutiny, and a pregnancy discrimination is invalid. The same is true of abortion.

Senator HATCH. Are you saying that she is arguing both sides of this issue?

Professor NOONAN. Well, I suppose we all feel as lawyers that there are arguments that are legitimate but perhaps not compelling arguments. But it seems to me that her own example shows, and the examples of the judges that she likes show, that you can really classify these things as you choose, depending on how you want to validate or invalidate the law.

Senator HATCH. How you want the law to turn out?

Professor NOONAN. Yes.

Senator HATCH. Well, I want to thank both of our witnesses for appearing today. I think both of you have been very articulate for your respective viewpoints. Clearly the issue has not been resolved by this hearing, and I am not sure how to resolve it. It is a serious issue and one that I think deserves the consideration of every American citizen before we put the ERA into the Constitution.

Notwithstanding, Professor Freedman's assurance as to how things are going to work out, the issue seems extremely open, in my view.

Of course, Professor Noonan, you have also drawn conclusions with which she disagrees.

In particular, you have raised two very important points. First, the title VII arguments that heretofore have not been raised, and second, the question of what a suspect classification is and how it will apply in this particular area. I do not know how anybody can ignore your testimony, whatever their views on this matter.

I wish we had a more definitive conclusion to the hearing, but I want to thank both of you. I have enjoyed the hearing very much.

We will recess until further notice.

Professor NOONAN. Thank you, Senator.

[Whereupon, at 12:42 p.m., the subcommittee was adjourned.]

[The following was submitted for the record:]

MISCELLANEOUS MATERIAL

THE EQUAL RIGHTS AMENDMENT & ABORTION
(Why the ERA May Enhance Abortion Rights)

Theory #1-- Harris v. McRae

In 1980, the Supreme Court in Harris v. McRae held that restrictions upon public funding of abortions ("Hyde Amendments") were constitutional. The case was decided by a 5-4 vote with the dissenting justices arguing that restrictions upon public funding of a medical procedure associated exclusively with women were in violation of the Equal Protection clause. The majority, however, relied upon the fact that the funding limitation did not disadvantage a "suspect class" (e.g. racial or ethnic minorities). Under the ERA, virtually nobody disputes that sex would become a "suspect class" thereby calling into question continued validity of Harris.

> Congressional Research Service: "[If sex becomes a suspect classification under ERA] , it would then follow that the ERA would reach abortion funding and abortion funding situations." (October 20, 1983 analysis)

Theory #2-- Title VII

Title VII (1964 Civil Rights Act) prohibits employment discrimination on the basis of sex. According to leading pro ERA scholars, legal precedents under Title VII would be "good" in understanding the ERA. Because similar abortion concerns were raised during debate on Title VII, that law contains an explicit disclaimer that employer refusals to pay for abortions does not constitute sex discrimination. Leading ERA supporters oppose similar language in the ERA.

Prof. Ann Freedman (leading ERA theorist): "The ERA mandates an analysis similar if not identical to that adopted by dissenters in Geduldig Title VII case from 1974 ."

> Geduldig (dissent): "By singling out for less favorable treatment a gender-linked disability peculiar to women (pregnancy), the State has created a double standard... This inevitably constitutes sex discrimination."

Theory #3-- Legislative History

The most compelling legislative history on the meaning of an amendment comes from its Congressional proponents. In responding to the alleged ERA/abortion connection, the Senate cosponsors of the ERA stated as follows: (Sen. Robert Packwood) "I'm not sure how a court would come out on it." (Sen. Paul Tsongas) "This issue would be resolved by the courts."

> NOW Resolution: "Be it resolved, that NOW serves notice on Congress that we will accept no amendments to the ERA [such as an abortion-neutral amendment] and that any sponsor willing to accept such amendments should remove her or his name from the list of sponsors.

Theory #4-- State Experience

In the past five years alone, litigation has been pursued in four States (Hawaii, Mass., Penn., Conn.) to overturn restrictions on public funding of abortion. This argument has yet to be accepted or rejected. What is clear, however, is that similar arguments will be raised under the national ERA.

> Doe v. Maher (Super. Ct. of Connecticut): "The constitutional arguments that [abortion funding limit] violates states Equal Rights Amendment... have substantial merit. Inasmuch as this is an application for temporary injunction that requires a prompt determination, the court finds that it must pass on these tempting and very persuasive arguments."

[SUBCOMMITTEE ON THE CONSTITUTION]

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A LEGAL ANALYSIS OF THE POTENTIAL IMPACT OF THE PROPOSED EQUAL RIGHTS AMENDMENT (ERA) ON THE RIGHT TO AN ABORTION OR TO THE FUNDING OF AN ABORTION

Karen J. Lewis
Legislative Attorney
American Law Division
October 20, 1983

EXECUTIVE SUMMARY

Throughout the ongoing debate over the ratification of the proposed Equal Rights Amendment (ERA), questions have arisen concerning (1) whether the ERA would have an impact on the substantive right to an abortion and/or (2) whether it would affect the public funding of abortions. This report reviews the various opinions expressed concerning this issue. The views are diverse, even among ERA proponents.

Following the discussion of the opinions regarding whether the ERA would have an impact on abortion and/or its public funding, this paper examines the broad question of whether pregnancy discrimination constitutes legally proscribed sex discrimination. Essential to analysing this problem is an explanation of the U.S. Supreme Court decisions concerning (1) abortion and the public funding of abortion from 1973 to the present and (2) pregnancy discrimination in both the constitutional and statutory framework.

This report analyses the abortion right in the context of the proposed ERA. In 1973, the Supreme Court held that (1) states may not categorically proscribe abortions by making their performance a crime and (2) states may not make abortions unnecessarily difficult to obtain by prescribing elaborate procedural guidelines. *Roe v. Wade*, 410 U.S. 113; *Doe v. Bolton*, 410 U.S. 179. A decade later the Court reaffirmed its holdings in *Roe* and *Doe*. *See City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 51 U.S.L.W. 4767 (June 15, 1983); *Planned Parenthood Association of Kansas City, Missouri, Inc.* v. *Ashcroft*, 51 U.S.L.W. 4783 (June 15, 1983); and *Simopoulos* v. *Virginia*, 51 U.S.L.W. 4791 (June 15, 1983).

With respect to the public funding of abortion, the Supreme Court has ruled that restrictions such as those involving the Medicaid program are statutorily and constitutionally permissible both with respect to nontherapeutic (elective) and therapeutic (medically necessary) abortions. *See Beal* v. *Doe*, 432 U.S. 438 (1977); *Maher* v. *Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977) (*per curiam*); *Harris* v. *McRae*, 448 U.S. 297 (1980); and *Williams* v. *Zbaraz*, 448 U.S. 358 (1980).

The concern of opponents of abortion and its public funding is that the ERA will broaden the already existing constitutional right to an abortion and/or cause the Supreme Court to reverse its public funding decisions and mandate the expenditure of government money for abortions. This report discusses the fact that to date there have been no state court decisions in states with state ERAs ruling definitively on the matter concerning whether the state ERA in question has an impact on abortion and/or abortion funding; however, in the states of Hawaii, Massachusetts, and Pennsylvania, in the process of litigating the abortion public funding issue, the question of whether the denial of public funding for abortions violated the state ERA was raised. The state courts did not decide that issue and rendered their decisions on other grounds.

Relevant to the inquiry into whether the proposed ERA would have an impact on abortion and/or abortion funding are three Supreme Court decisions involving pregnancy: Geduldig v. Aiello, 417 U.S. 484 (1974), General Electric Co. v. Gilbert, 429 U.S. 125 (1976), and Newport News Shipbuilding and Dry Dock Co. v. EEOC, 51 U.S.L.W. 4837 (June 20, 1983). These are important both in terms of the analysis used by the Court as well as the holdings. In Geduldig v. Aiello, the Court applied a constitutional analysis because the case was decided on Fourteenth Amendment equal protection grounds. Since the ERA is only in proposed form, without a fully developed legislative history and court decisions interpreting it, the Fourteenth Amendment and contemporaneous court rulings with respect to sex discrimination are the best place to look for guidance in how the Supreme Court may apply the ERA. In Geduldig v. Aiello, the Court found that the State of California's income insurance plan's exclusion of coverage for normal pregnancy did not amount to sex discrimination absent a showing that it was a pretext for invidious discrimination. The Court's constitutional analysis involved the application of a rational basis standard, i.e. the Court reasoned that the exclusion of pregnancy was a permissible means for achieving the legitimate state purpose of maintaining a low-cost, employee supported insurance plan. The Court ruled that there was no sex discrimination absent proof of an intent to discriminate. In short, proof of intent is essential to making out a case of discrimination under the equal protection clause of the Fourteenth Amendment. The Court recognized in Geduldig v. Aiello that pregnancy was related to sex, but it simply refused to go so far as to hold that this classification constituted legally proscribed gender discrimination.

Some proponents of the ERA have contended that the ERA would have no impact on abortion and/or its funding. They theorize that the ability to become pregnant stems from a unique physical characteristic and would thus be exempt from the ERA. Only women can become pregnant, i.e. the reproductive function is unique to females. Since men are not similarly situated in this context, there would be no sex discrimination under the ERA. This point of view would be consistent with Geduldig v. Aiello, the only U.S. Supreme Court precedent under the equal protection clause with respect to a regulation having an adverse impact on pregnant women. Thus, if the Court were to apply the same constitutional analysis under the ERA as it did under the equal protection clause, it would appear that there would be no impact on abortion absent proof of intent to discriminate on the basis of sex.

In the General Electric Co. v. Gilbert case, the Supreme Court decided that the exclusion of pregnancy from an otherwise comprehensive, privately funded, employee disability benefits plan did not constitute sex discrimination prohibited by Title VII of the 1964 Civil Rights Act. The Court applied the same constitutional analysis it used in Geduldig v. Aiello even though the challenge was based on a statute and not on the equal protection clause of the Constitution. Congress subsequently amended Title VII to cover pregnancy as a form of sex discrimination and thus overruled the Gilbert decision; however, Congress specifically provided for an abortion exception in this amendment. The amendment provides in pertinent part that employers are not required to pay for health insurance benefits for abortion except where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from an abortion. This legislation is popularly referred to as the Pregnancy Discrimination Act of 1978.

The Supreme Court itself clarified another matter which was left in limbo by the *Gilbert* decision when it decided *Dothard* v. *Rawlinson*, 433 U.S. 321, in 1977. Because the court employed the same constitutonal analysis in *Gilbert* as in *Aiello* requiring proof of intent to make out a case of sex discrimination even though *Gilbert* involved an alleged statutory violation, it was unclear whether the Court was rejecting the disproportionate impact analysis or "effects" test that it had accepted earlier in *Griggs* v. *Duke Power Co*., 401 U.S. 424 (1971), as sufficient to prove discrimination under a statute. *Griggs* was a case of race discrimination. After *Dothard*, however, it became clear that the Court intended to apply two different standards (1) one of intent in situations where the equal protection clause of the Fourteenth Amendment is violated and (2) one of effects in instances where there is a possible violation of a statutory prohibition. This is true with respect to both race and sex classifications.

During this past 1982-83 Term, the Court interpreted the anti-pregnancy discrimination provision in Title VII clarifying that pregnancy discrimination constitutes legally proscribed sex discrimination under Title VII. *Newport News Shipbuilding and Dry Dock Co*. v. *EEOC*, 51 U.S.L.W. 4837 (June 20, 1983). The significant aspect of this ruling, however, is that the disproportionate impact analysis may have limited relevance in this pregnancy discrimination context because the Court indicated in *Newport News* that the Title VII proscription applies to both male and female employees who are discriminated against in employment. The Court held that company medical plans must cover the pregnancies of employees' wives to the same extent that they cover all other dependents' medical expenses. Failure to provide comparable coverage for dependents' pregnancies constitutes illegal sex discrimination against male employees.

In the constitutional context, the Court will go through an application of a particular standard of review — traditional, rational basis; intermediate; or active, strict scrutiny — depending upon the facts of the case, the classification involved, and the nature of the discrimination. It is a very sophisticated approach to ascertaining whether or not a person has been denied equal protection of the laws. When the Court is faced with a case that involves a specific statute like Title VII of the 1964 Civil Rights Act, its review of the facts is done in accordance with the wording of the statute which has allegedly been violated and where the statute is facially neutral, a showing of disproportionate impact, at least in the Title VII situation, is sufficient to make out a case of discrimination. Thus, when employment discrimination under Title VII is the allegation, once the plaintiff establishes a *prima facie* case of discrimination under the disproportionate impact analysis, then the burden shifts to the employer to prove that the disqualifying employment practice is related to the employment in question. While the test under Title VII is one of impact, the test under the equal protection clause of the Fourteenth Amendment is one of intent. It is much more difficult to prove intent or a discriminatory animus and establish one's case under the equal protection clause than it is to show disproportionate impact under Title VII.

A LEGAL ANALYSIS OF THE POTENTIAL IMPACT OF THE PROPOSED EQUAL RIGHTS AMENDMENT (ERA) ON THE RIGHT TO AN ABORTION OR THE FUNDING OF AN ABORTION

INTRODUCTION

Throughout the ongoing debate over the ratification of the proposed Equal Rights Amendment (ERA), questions have arisen concerning (1) whether the ERA would have an impact on the substantive right to an abortion and/or (2) whether it would affect the public funding of abortions. In 1973, the U.S. Supreme Court held that (1) states may not categorically proscribe abortions by making their performance a crime and (2) states may not make abortions unnecessarily difficult to obtain by prescribing elaborate procedural guidelines. *Roe* v. *Wade*, 410 U.S. 113; *Doe* v. *Bolton*, 410 U.S. 179. Ten years later the Court reaffirmed its holdings in *Roe* and *Doe*. *See* *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 51 U.S.L.W. 4767 (June 15, 1983); *Planned Parenthood Association of Kansas City, Missouri, Inc.* v. *Ashcroft*, 51 U.S.L.W. 4783 (June 15, 1983); and *Simopoulos* v. *Virginia*, 51 U.S.L.W. 4791 (June 15, 1983).

With respect to the public funding of abortion, the Supreme Court has ruled that restrictions, such as those involving the Medicaid program, are statutorily and constitutionally permissible both in the context of non-therapeutic (elective) as well as therapeutic (medically necessary abortions). *See* *Beal* v. *Doe*, 432 U.S. 438 (1977); *Maher* v. *Roe*, 432 U.S. 464 (1977); *Poelker* v. *Doe*, 432 U.S. 519 (1977) (*per curiam*); *Harris* v. *McRae*, 448 U.S. 297 (1980); and *Williams* v. *Zbaraz*, 448 U.S. 358 (1980).

The distinction between the constitutional requirement of proof of intent and the statutory requirement of a showing of disproportionate impact is important in the analysis of whether the proposed ERA would have an impact upon abortion and/or its public funding. If intent is the test that has to be met, then it is arguable that the ERA would not affect abortion because the same result would be reached as in *Geduldig v. Aiello* which the Court decided on Fourteenth Amendment equal protection grounds. However, if Congress establishes in the legislative record that a disproportionate impact test is sufficient to make out a constitutional violation under the ERA, as now exists with respect to proving statutory violations, then it would appear that the ERA would reach the abortion situation.

This report concludes that in making a determination of the impact of the ERA on abortion, abortion funding, and other pregnancy related issues, one would have to decide whether a pregnancy classification would be a sex-based classification under the ERA. It was not regarded to be such under the equal protection clause of the Fourteenth Amendment as the Court held in *Aiello*. Resolution of this question with respect to the ERA turns on the standard of review the Court chooses to apply—strict scrutiny, intermediate, or traditional, rational basis. On the scale of review from the highest standard of strict scrutiny to the lowest standard of rational basis, the classification is less likely to withstand constitutional challenge when strict scrutiny is applied than when rational basis is the review used by Court. Thus, under strict scrutiny, a pregnancy classification would probably be regarded to be a sex-based classification prohibited by the ERA. However, if the Court applied a rational basis standard, a pregnancy classification would probably not be deemed to be a sex-based classification. In cases where the Court uses an intermediate standard of review, the outcome would be less clear-cut and less predictable. Should the Court determine under a particular standard of review analysis that the pregnancy classification is not sex-based, then the former must be evaluated under an intent/impact analysis because as to the forbidden classification, i.e. gender, it would be facially neutral.
On the one hand, one must look to the legislative history established by Congress to find out what the Congress' motives were in this regard. What did Congress intend with respect to pregnancy classifications? If it is discernible that Congress wanted an intent test to apply under the ERA, then proof of intentional discrimination must be shown in order to get a court to invalidate the pregnancy classification on constitutional grounds. On the other hand, there is also the option of applying an impact analysis in lieu of the intent test. Should an impact analysis control under the ERA and the impact of the classification is borne by women only, then the ERA would affect abortion and/or abortion funding. In this situation, only women can become pregnant, and therefore, the pregnancy classification would be sex-based.

The recent Supreme Court decision in *Newport News*, however, indicates that there can be a situation where impact affects *both* females and males alike. In the context of Title VII, the Court interpreted a pregnancy classification to be unlawful sex discrimination. The interesting aspect of *Newport News* is that it reveals that there can be instances where impact affects both women and men in a sex-based sense, and if such is the case under a statute like Title VII, one might argue that a similar result could conceivably occur in the constitutional context. This paper points out that if the latter is the case, then the impact analysis would be of limited relevance insofar as women are affected, and the ERA would not have an impact on abortion and/or its public funding.

Both proponents and opponents of the ERA have expressed differing opinions regarding the question of whether the proposed amendment would have an impact on the right to abortion itself or whether it would affect the public funding of abortions. In fact, even among proponents there are diverse opinions. On the one hand, some ERA proponents have asserted that there is no connection between the ERA and abortion. On the other hand, there are other proponents of the ERA who have tried to find support in existing state ERAs for protecting a woman's right to have her abortion paid for with public funds. Then there are certain ERA opponents who have argued similarly that there is a relationship between the ERA and abortion, and that, the ERA would in fact broaden one's right to abortion, opening up as well the use of public money to pay for abortions. Supporters of ERA who oppose abortion have voiced concerns about whether the ERA would have such an effect on abortion.

In discussing the question of whether the proposed ERA would have an impact on abortion, both in the substantive sense as well as in the funding context, one must understand the nature of the arguments and the concerns advanced by proponents and opponents of the ERA. It also becomes essential to understand the positions held by pro-life and pro-choice advocates. The lines of demarcation are not completely clear-cut as these two issues converge. Both ERA and abortion evoke emotional responses from people with strong opinions respecting each. Combining the issues to ascertain the nature of the interrelationship, if any, complicates an already complex matter even further.

The purpose of this report is to analyze the abortion right in the context of the proposed ERA. By addressing the concerns that have been raised in the debate over the ERA regarding its impact on abortion, a legal discussion that is both thorough and balanced should emerge.

At the very outset, we discuss the arguments that have been made with respect to the ERA and abortion. After this review of the opinions expressed by proponents and opponents of the ERA, there follows an examination of the question whether discrimination based on pregnancy and complications arising therefrom amounts to legally proscribed sex discrimination. Then the analysis turns to an explanation of the proposed ERA and includes a discussion of the legislative history behind the proposed amendment and the various constitutional standards of review. The analysis in this report treats both the questions of the potential impact of the ERA on the substantive right to an abortion itself as well as its possible effect on the public funding of this right. The Supreme Court has in the past viewed the funding question as one that is separate and apart from the substantive right to an abortion.

DISCUSSION OF OPINIONS EXPRESSED CONCERNING POTENTIAL IMPACT OF ERA ON ABORTION

A. Views of ERA Proponents

As we indicated earlier, proponents of the ERA are divided in their opinions concerning whether the ERA would have an impact upon abortion.

An article in the *Human Life Review* has focused on the differing views expressed by supporters of the ERA with respect to this issue.[1/] For example, Professor Laurence Tribe of Harvard is quoted as stating the following when asked about the impact of the Massachusetts state ERA on abortion:

> In response to your request that I study the implications of the proposed Equal Rights Amendment to the Massachusetts Constitution with respect to the issues of abortion, I have examined the text of the Amendment and decisions in related areas and have concluded that adoption of the amendment would have no effect whatever on the power of the state to regulate abortion or to protect fetuses consistent with the federal Constitution generally. [2/]

The proposed Massachusetts ERA, which was ultimately adopted to become part of the state's constitution provides in pertinent part: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." Its phrasing is slightly different from the federal proposal.

Another ERA proponent who has contended that the ERA would not have an impact upon abortion is Thomas I. Emerson, a Professor from Yale Law School. Professor Emerson testified at a Senate Hearing that:

[1/] Oliphant, "ERA and the Abortion Connection," 7 Human Life Review 42 (Spring 1981).

[2/] Laurence Tribe quoted in 7 Human Life Review 42 (Spring, 1981), *supra*, as originally quoted in David Farrell, "SJC Ruling Could Affect ERA Votes," *Boston Globe*, Sept. 7, 1980. p. A6.

> The ERA has nothing to do with the power of the states to stop or regulate abortions, or the right of women to demand abortions. The state's power over abortions depends upon wholly different constitutional considerations, primarily the right of privacy, and would not be affected one way or the other by passage of the ERA. This allegation [that there is an ERA-abortion connection] is pure red herring. 3/

In an amicus brief filed in General Electric Company v. Gilbert, 429 U.S. 125 (1976), by the Women's Law Project and the American Civil Liberties Union, the amici made a contrary argument. Professor Emerson signed this amicus brief. In this case, the company offered a disability insurance coverage program for its employees, and coverage for pregnancy was not included. The plan was challenged as being violative of Title VII of the 1964 Civil Rights Act, as amended (42 U.S.C. 2000e et seq.), which prohibits discrimination based on sex in employment. The Supreme Court held that there was no Title VII violation; nevertheless, the arguments made in the amicus briefs filed with the Court are relevant for the purpose of ascertaining what was said regarding the proposed ERA and abortion. The amicus brief to which Professor Thomas I. Emerson signed his name made the following argument:

> ...congressional consideration of the equal rights amendment centered on that body's grave concern for the deplorable treatment of women in the labor market and its recognition of the importance of not penalizing women, in or out of the paid labor force, for bearing children. In line with the central tenet of the ERA—that legal support for sex discrimination is to be eradicated root and branch—Congress clearly intended the amendment to end all categorical discrimination by law, including the improper use of pregnancy-based

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3/ Thomas I. Emerson, Statement on Proposed Resolution to Rescind Connecticut's Ratification of the Equal Rights Amendment, reprinted in Hearings on S.J. Res. 134 Before the Subcomm. on the Constitution of the Senate Judiciary Comm., 95th Cong., 2d Sess., 136, 138 (1978) as quoted in 7 Human Life Review 42, supra, at 45.

> classification, which relegates women to an inferior position in the labor market.
>
> Legislative history reflects the congressional intention that there be a two-tiered standard of judicial review under the ERA: (1) explicit gender classifications are *per se* outlawed; (2) classifications purporting to deal with a "unique physical characteristic" of one sex are subject to strict scrutiny. Some pregnancy classifications would survive this review. Others, the one at issue here for example, would not.
>
> The legislative history of the ERA, therefore, to the extent it illuminates the meaning of the anti-discrimination guarantee of Title VII, fully supports the conclusion that GE's policy of excluding pregnancy-related disabilities from its plan is illegal.
>
> *Amici Curiae* Brief of Women's Law Project and American Civil Liberties Union at 4-5, *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976).

In the *General Electric* v. *Gilbert* case, the company was arguing that pregnancy is a unique physical characteristic peculiar to only one sex, and thus, there could be no issue of sex discrimination. The amicus brief signed by Professor Emerson disputed this argument and contended instead that pregnancy was like any other ordinary temporary disability. Amici wrote:

> The legislative history of the ERA includes several examples of pregnancy classifications permissible under the amendment. Among these are "a law providing for payment of the medical costs of childbearing," and "laws establishing medical leave for childbearing." These pregnancy classifications are valid not because (as suggested by GE) pregnancy classification is outside the scope of the ERA, but because the test applicable under the ERA is satisfied.
>
> ...ERA broadly proscribes classifications based on gender as such. For classification purporting to deal with "unique physical characteristics" of one sex, however, legislative history demonstrates that strict scrutiny must be the review standard applied, to insure that the basic premise of the amendment is not undermined.
>
> *Id*. at 13-14.

Amici continue that if G.E. were a state employer subject to the ERA, then "its treatment of disabilities related to pregnancy and childbirth would not survive the scrutiny appropriate under the amendment." *Id*. They point out that the necessary nexus between the classification and the unique feature of pregnancy is absent here, and state: "In the context of employment, disabilities related to pregnancy and childbearing are not different from other temporary disabilities." *Id*. In addition, they argue that "no compelling interest justifies a pregnancy classification in this context. The state *as an employer* has no interest in maternal health and child health distinct from its interest in the health and well being of all employees." *Id*. at 20.

This argument developed in the amicus brief signed by Professor Emerson in the *G.E.* v. *Gilbert* case emphasizes the point that there are and can be instances in which the condition of pregnancy does not flow from the unique physical characteristic doctrine, thus exempting classifications based on it from coverage of the ERA. The argument developed in this amicus brief raises questions concerning the opposing view that because pregnancy is unique to the female sex, there can be no issue of discrimination based on sex. This issue does reveal a split among ERA proponents with respect to interpreting its impact on a pregnancy-related subject like abortion.

Two other ERA proponents have made a case for the position that the ERA and abortion are seperate and distinct matters. Citing the ERA's legislative history, Elizabeth Alexander, a lawyer and legal advisor to "Catholics Act for ERA," and Maureen Fiedler, a nun and the national coordinator for that organization, quoted the Senate Report:

> The original resolution does not require that women must be treated in all respects the same as men. "Equality" does not mean "sameness." As a result, the original

> resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. 6/

Author of the Human Life Review article quoted Alexander and Fiedler as concluding:

> In these statements, Congress clearly expressed its intention that the Equal Rights Amendment should not be applied to abortion laws since pregnancy and the corollary ability to have an abortion obviously flow from physical characteristics unique to the female sex. Such a clear statement of intent would be difficult for the Supreme Court or any court to overcome.
>
> Furthermore, Congress provided the judicial branch with a sound legal basis for excluding abortion from the broad equality mandate of the E.R.A., by providing an exclusion for unique physical characteristics.
>
> Abortion is a situation that arises from the unique physical characteristic of pregnancy. In this situation, there is no characteristic that can be shared with the other sex because, of course, men are incapable of becoming pregnant and of having abortions. Where the characteristic is not shared with the other sex, there can be no issue of discrimination based on sex. Since it is impossible to treat men and women equally in this area, there can be no showing of a purpose or intent to discriminate.
>
> Thus, a legal argument in this case that alleged discrimination because of impact on one sex would certainly fail. Similarly, the idea of discrimination arising because women are forced to bear unwanted children makes no sense because men have no "right" or capability of bearing any child, wanted or unwanted. Put in simplest terms, the Equal Rights Amendment guarantees equal rights for men and women. Men can't get pregnant, can't have babies, and can't have abortions. There is no way any E.R.A. can give, or deny, men an "equal right" to abortion with women!

In the abortion funding context, some ERA proponents have made the argument in proceeding before the courts of states with state ERA's that to deny a woman

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6/ Alexander & Fiedler, "The Equal Rights Amendment and Abortion: Separate and Distinct," America 314, 315-16 (April 12, 1980), as quoted in 7 Human Life Review 42, supra, at 52. This represents the authors' view based upon the Senate Report and other legislative history.

public funds for abortion violates the state ERA. In the State of Hawaii, for example, applicant doctors filed a motion to intervene to protect (1) their rights to practice medicine and (2) the rights of their patients to choose abortion. Hawaii Right to Life, Inc. v. Chang, Director of Department of Social Services and Housing, Civ. No. 53567, Memorandum In Support of Motion to Intervene, p. 1. This case began in January, 1978, when the Hawaii Right to Life, Inc. filed suit in Hawaii circuit court seeking to enjoin the State of Hawaii from funding "elective" or "non-therapeutic" abortions. The applicants for this intervention motion were certified providers of Medicaid abortion services in Hawaii. These applicants also benefited from state Medicaid reimbursement. They argued that any restriction on the state's current Medicaid abortion reimbursement policy would restrict doctors in the exercise of their independent medical judgments when treating their individual patients because they would only be paid for certain abortions. The memorandum in support of the motion to intervene states:

> Applicants' first claim to reimbursement as a matter of right rests on the Hawaii Constitution's guarantees of due process and equal protection and Article I, Sec. 21 which provides that "equality of rights under the law shall not be denied or abridged by the State on account of sex." Abortion is a medical procedure performed only for women; withdrawing funding for abortions while continuing to reimburse other medical procedures sought by both sexes or only by men would be tantamount to a denial of equal rights on account of sex.

Id. at p. 7.

It should be noted that the Circuit Court of the First Circuit in Hawaii never reached the constitutional questions when it issued its order granting defendants' motion for summary judgment on February 20, 1979. The Hawaii court ruled that the Plaintiff Hawaii Right to Life, Inc., had the standing as taxpayers to file this action; however, the defendant Department of Social

Services and Housing is authorized to use State funds for the payment of costs of elective abortions of persons otherwise eligible to receive medical care under the Department's medical assistance program. It was not necessary to even reach the constitutional issues raised.

In a Massachusetts abortion funding case, Moe v. Secretary of Administration and Finance et al. Docket No. 2231, attorneys for the plaintiffs made the argument that certain statutory restrictions on the funding of abortion under the Massachusetts Medicaid plan are unconstitutional because they exclude coverage of abortion, a service which applies only to women, in an otherwise comprehensive Medicaid program which includes a wide variety of male specific operations. Complainants specifically contended that these statutory limitations violated the Equal Rights Amendment to the Massachusetts Constitution:

> By singling out for special treatment and effectively excluding from coverage an operation which is unique to women, while including without comparable limitation a wide range of other operations, including those which are unique to men, the statutes constitute discrimination on the basis of sex, in violation of the Massachusetts Equal Rights Amendment, Pt. 1, Article I of the Massachusetts Constitution (as amended by Article 106, approved November 2, 1976).
>
> Complaint in Moe v. Secretary of Administration and Secretary of Administration and Finance, No. 2231, at p. 11.

The 1981 decision by the Supreme Judicial Court in Massachusetts did not address the argument regarding the state ERA. Instead, it struck down the challenged statutes on other grounds, specifically due process grounds. Moe v. Secretary of Administration and Finance, No. 2231, Slip Opinion at p. 20. The court wrote:

> ...We think our Declaration of Rights affords a greater degree of protection to the right asserted

> more than does the Federal Constitution as interpreted by *Harris* v. *McRae*, *supra*.
>
> As we have demonstrated the limitation on State action which is imposed by the fundamental right of privacy declared in *Roe* v. *Wade*, *supra*, is one of neutrality. We do not understand the plaintiffs here to assert either an absolute right to have abortions or an equivalent right to have their abortions subsidized by the State. Their claim is more limited...their claim is... limited to an assertion of "the right to have abortions nondiscriminatorily funded."
>
> *Id*. at 28-29.

The Massachusetts court emphasized the principle that once the state legislature decides "to enter the constitutionally protected area of choice, it must do so with genuine indifference." *Id*. at 33. Thus, it concluded that the challenged restriction was unconstitutional in so far as it prohibited the use of state Medicaid funds "to reimburse authorized providers for lawful, medically necessary abortion services rendered to qualified Medicaid recipients." *Id*. at p. 39. The court remanded the case to the county court with specific instructions to enter a judgment (1) declaring that the members of the plaintiff class of Medicaid - eligible pregnant women are entitled to nondiscriminatory funding of lawful, medically necessary abortion services and (2) enjoining the enforcement of the challenged restrictive statutory provisions. *Id*. at 41.

In an abortion funding case in the State of Pennsylvania, *Fischer* v. *Department of Public Welfare*, No. 283 C.D. 1981, plaintiffs filed an Amended Petition for Review in the nature of a Complaint in Equity in which they argued violation of the state ERA at p. 24. The plaintiffs were challenging the Pennsylvania restrictions prohibiting the expenditure of state or federal money for the performance of abortions, "except where a physician has certified in writing that the life of the woman would be endangered if the fetus were carried to full term, or where necessary for victims of rape or incest which has been promptly reported to a law enforcement agency or public health service." *Id*. at 1. Another provision prohibited such monies for the performance of abortions "except where a physician has certified that the abortion is necessary to avert death or where the pregnancy results from a rape that has been personally reported to a law enforcement agency by the victim or her agent or where an incest victim has reported the incest to a law enforcement agency within 72 hours of learning of her pregnancy." *Id.*

With respect to the allegation that such restrictions violated the state ERA, plaintiffs argued in pertinent part:

> ...All indigent or medically indigent males in Pennsylvania have coverage for all medically necessary services pursuant to the Medical Assistance Program.
>
> Pursuant to 62 P.S. § 453 and 18 PA. C.S.A. § 3215(c) and regulations, indigent or medically indigent females in Pennsylvania receive coverage for less than all medically necessary services.
>
> Pregnancy is unique to women. 62 P.S. § 453 and 18 Pa. C.S.A. § 3215(c) which expressly deny benefits for health problems arising out of pregnancy, discriminates against women recipients because of their sex.
>
> 62 P.S. § 453, 18 Pa. C.S.A. § 3215(c) and the regulations issued pursuant thereto constitute a gender-based classification in violation of the Pennsylvania Equal Rights Amendment, Article I, § 28 of the Pennsylvania Constitution.
>
> *Id.* at p. 24.

The Commonwealth Court of Pennsylvania filed an Opinion in Support of Overruling Preliminary Objections on April 8, 1982. In it, the court did *not* decide the merits of any of the petitioner's contentions. The court stated:

> ...We conclude only that the Commonwealth has brought to our attention no controlling authority in support of its demurrer, that a number of the petitioners' contentions depend for their just resolution on an examination and assessment of the relevant facts, and that it would be improper to dismiss the petitioners'claims in the summary manner proposed by the respondents.
>
> Opinion In Support of Overruling Preliminary Objections, April 8, 1982, Commonwealth Court of Pennsylvania, at p. 9.

Another opinion was filed on the same day in support of sustaining the respondents' preliminary objections. Thus, both respondents and petitioners failed to persuade a majority of the court of their respective positions regarding these preliminary objections. Nevertheless, the court stated in its *Per Curiam* Order that because it recognized that "an order is necessary before an appeal of this matter may be taken to our Supreme Court," it was ordering that the respondents' preliminary objections be overruled. It also went on to certify that a controlling question of law to which there was substantial ground for difference of opinion existed and "that an immediate appeal from this order may materially advance the ultimate termination of the case..." *Fischer* v. *Department of Public Welfare*, No. 283, *Per Curiam* at p. 1.

B. Views of ERA Opponents

On May 26, 1983, Congressman Henry Hyde testified before the Senate Judiciary Subcommittee on the Constitution regarding the proposed ERA introduced in the 98th Congress. He specifically addressed his remarks to the question of the impact of the ERA on abortion, particularly abortion funding. He noted in his opening statement that:

> ...recent experience suggests that the ERA, if it is proposed and ratified without an explicit provision against its use as a pro-abortion device, will, in fact, be used to sweep away the minimal protection of unborn children that the courts currently allow, and also to mandate tax funding for abortions...
>
> Some of the most important supporters of the ERA have argued and stated publicly that they regard restrictions on abortion, and even the refusal of legislatures to finance abortions, as a form of sex discrimination. And judges, including some of the Justices of the United States Supreme Court, have given reasons to believe that they will be receptive to such arguments.
>
> Testimony of Honorable Henry J. Hyde, Before Senate Judiciary Subcommittee on the Constitution, May 26, 1983, at pp. 1-2.

Congressman Hyde then specifically went on to cite the activities in certain states with state ERAs. He focused on Hawaii, Massachusetts, and Pennsylvania and discussed litigation in these three states involving state ERAs and abortion funding. He recognized that in each instance there was no court ruling on the merits regarding the issue of the ERA; however, he pointed out that his concern stems from the fact that these cases evidence that "the pro-abortion movement regards ERA as a valuable tool in the fight against abortion funding restrictions." Id. at p. 2. He continued:

> ...Now, these Hawaii, Massachusetts and Pennsylvania cases were decided on other grounds, albeit favorably to abortion funding. The argument advanced by the abortionists in all three cases, however, is firmly grounded in past decisions of the United States Supreme Court.
>
> Id. at pp. 3-4.

Congressman Hyde expresses concern that the U.S. Supreme Court's decisions upholding federal funding restrictions regarding abortion may be overruled should the ERA be ratified and sex be accorded the status of being a suspect classification warranting the application of strict scrutiny by the courts. He wrote:

> Strict scrutiny almost always results in the laws being struck down as unconstitutional. If either sex or poverty had been designated by the Court as a suspect classification, then the Court would almost certainly have found a right to abortion funding.
>
> Id. at p. 4.

His testimony also reveals a certain distrust of the judiciary with respect to how it might interpret the impact of the ERA on abortion and abortion funding:

> In 1973, the federal judiciary found a right to abortion as a corollary of a right to privacy that is not even mentioned in the Constitution. The judiciary is quite capable of finding an even broader right to abortion and abortion funding in the ERA, whose advocates have already provided the arguments for such a right. Congress should not give the Courts this opportunity.
>
> Id. at p. 9.

Congressman Hyde recommended inserting clarifying language in the ERA "so that it cannot be used to expand abortion rights." *Id.* at p. 10. Thus, he believes that without this language not only would the right to abortion be expanded, but the amendment would mandate public funding of abortion.

Charles E. Rice, Professor of Law at Notre Dame, has stated:

> Nobody can tell with certainty what the effect of the ERA will be upon state abortion laws. The uncertainty as to its application in several areas is one of the main drawbacks of the ERA. But it could be fairly argued, and I happen to believe, that if the ERA were adopted it would make it abundantly clear that the states are disabled from prohibiting or even restricting abortion in any significant way... The combination of the Supreme Court abortion decisions and the Equal Rights Amendment would operate to prevent any restrictions on abortion which are more stringent than the restrictions imposed on sexually neutral operations such as appendectomies. 5/

Another ERA opponent, Professor Joseph P. Witherspoon from the University of Texas, has written:

> ERA *may* be viewed as guaranteeing to a woman that her right of privacy, including the right to medical treatment, may not be cut off by anti-abortion legislation which prevents only a woman from obtaining medical treatment but not a man and thus as confirming and ratifying through a formula against discrimination based upon sex the basic result reached in *Roe* v. *Wade* on the basis of the extension of the right to privacy. There is some evidence that scholars like Emerson may have had in mind using the ERA as a basis for attacking anti-abortion laws in the event the court tests failed. 6/

5/ Professor Charles E. Rice in a letter to Mrs. Paul White, February 3, 1975, as quoted in 7 Human Life Review 42, *supra* at 47.

6/ Memorandum from Joseph P. Witherspoon to the Board of Directors, National Right-to-Life Committee, September 15, 1975, (emphasis in original), as quoted in 7 Human Life Review 42, *supra* at 47.

On May 26, 1983, Walter Berns, Resident Scholar at the American Enterprise Institute and Professional Lecturer at Georgetown University, testified before the Senate Judiciary Subcommittee on the Constitution concerning the current ERA proposal in the 98th Congress. He is opposed to the ERA and with respect to existing sex discrimination, he remarked in his statement to the Subcommittee:

> ...There is still work to be done. But to do that work does not require a constitutional amendment. All vestiges of discrimination can be eliminated by simple legislative enactment, many of them by acts of Congress...I urge you to leave the Constitution alone...
> ...The Constitution may not be perfect, but it is a better document now than it would be with this ERA. 7/

With respect to the question of whether the ERA would have an impact upon abortion, Mr. Berns drew attention to a statement made by the U.S. Supreme Court in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), regarding a husband who may have a "deep and proper concern and interest...in his wife's pregnancy and in the growth and development of the fetus she is carrying," but, in the event of a conflict, his interest must give way to a wife's right to have an abortion. Mr. Berns looked at this point in the Danforth case and remarked: "Read literally, the ERA would convert his interest into a right, a right equal to the wife's." Id. at p. 6.

In his article in the Spring 1981 Human Life Review, "ERA and the Abortion Connection", Lincoln Oliphant, a Washington lawyer wrote:

> Whether adoption of the Equal Rights Amendment will reinforce or supplement the theory of the Abortion Cases is a matter of dispute...

7/ Testimony of Walter Berns, Resident Scholar at American Enterprise Institute and Professional Lecturer at Georgetown University, Before Senate Judiciary Subcommittee on the Constitution, May 26, 1983, pp. 6-7.

> The second legal question asks whether ERA will expand abortion rights already established. The area for possible expansion is small indeed, but not nonexistent...
>
> The third legal question asks about new abortion rights. Most conspicuous is the question of funding...
>
> If the Equal Rights Amendment had been in the Constitution when *McRae* was decided, the result surely would have been opposite. ERA is designed to make the class of women (and the class of men) a suspect class. Legal distinctions between men and women will be eliminated entirely or (for those distinctions purportedly based on unique physical characteristics) subject to strict judicial scrutiny. If women were a suspect class, and if the Hyde Amendment had to undergo strict judicial scrutiny (both because of ratification of the Equal Rights Amendment), this Supreme Court would have held that the Constitution mandated public funding of abortions...
>
> If the Equal Rights Amendment is ratified, we can expect attempts to overturn the abortion funding cases. The arguments in federal courts will follow the arguments now being made in the Massachusetts court: prohibitions against abortion funding will be said to be sex discrimination in violation of the ERA. Attempts by some proponents of the Amendment to gloss over ERA's potential for serious mischief in the abortion area are disingenuous, misleading and unworthy of the importance of the issue.
>
> 7 *Human* Life Review 42, *supra* at pp. 46-48.

To summarise, the foregoing discussion illustrates that while to date there have been no state court decisions in states with state ERAs ruling definitively on the matter concerning whether the state ERA in question impacts on abortion and/or abortion funding, the issue of possible impact has been raised. Arguments have been made on both sides. Some proponents of the ERA have contended that the ERA would have no impact on abortion and/or its funding. They theorise that the ability to become pregnant stems from a unique physical characteristic and would thus be exempt from the ERA. Only women can become pregnant, i.e. the reproductive function is unique to females. Since men are not similarly situated in this context, there would be no sex discrimination under the ERA. This point of view would be consistent with the only U.S. Supreme Court precedent under the equal protection clause with respect to a regulation having an adverse impact on pregnant women. There are other ERA proponents who argue to the contrary. They point out that the effects of discriminating on the basis of pregnancy are such that there is gender discrimination. There are also proponents of the amendment who argue that the physical uniqueness exemption has no application because the discrimination based on pregnancy is not necessarily confined exclusively to the reproductive function itself, i.e. only the reproductive aspect would qualify for the exemption.

Then in the abortion funding context there have been ERA proponents in certain state ERA cases who have argued in complaints and briefs filed before state courts that to deny public funds for abortion constitutes sex discrimination because only women can become pregnant and to single them out to deny them funds for this purpose violates the state ERAs in question. Opponents of the ERA and of abortion have looked at these arguments particularly and have raised questions and have also contended that there is a possibility that the ERA could expand a women's right to an abortion as well as mandate the expenditure of public money for abortion.

DISCUSSION OF WHETHER PREGNANCY DISCRIMINATION CONSTITUTES LEGALLY PROSCRIBED SEX DISCRIMINATION

In this section of our report, we shall first describe the current state of the law with respect to (1) the constitutional right to an abortion and (2) the constitutional as well as statutory right to the public funding of an abortion. The substantive right to an abortion and the use of public money to effectuate that right are different from a constitutional perspective, and the U.S. Supreme Court has treated them separately. The leading Supreme Court decisions in each context will be explained.

For the purposes of this paper, it is important to show how abortion fits into the category of pregnancy. This necessitates also analyzing the Court's relevant decisions concerning pregnancy to ascertain whether pregnancy discrimination in fact constitutes legally prohibited sex discrimination. Pregnancy is clearly sexually related, but the significant question is whether discrimination based on it is legally proscribed.

I. Substantive Right to An Abortion: Current State of the Law

A. The Supreme Court's 1973 Abortion Rulings

Between 1968 and 1972 the constitutionality of restrictive abortion statutes of many states were challenged on the grounds of vagueness, violation of the fundamental right of privacy, and denial of equal protection under these laws. These challenges met with mixed success in the lower courts. However, in January, 1973, the Supreme Court issued its rulings in Roe v. Wade and Doe v. Bolton. In those cases the Court found that Texas and Georgia statutes regulating abortion interfered to an unconstitutional extent with a woman's right to decide whether to terminate her pregnancy. The Texas statute forbade all abortions not necessary "for the purpose of saving the life of the mother." The Georgia enactment permitted abortions when continued pregnancy seriously threatened the woman's life or health, when the fetus was very likely to have severe birth defects, or when the pregnancy resulted from rape. The Georgia statute required, however, that abortions be performed only at accredited hospitals and only after approval by a hospital committee and two consulting physicians.

The Court's decisions were delivered by Mr. Justice Blackmun for himself and six other Justices. Justices White and Rehnquist dissented. The Court ruled that states may not categorically proscribe abortions by making their performance a crime, and that states may not make abortions unnecessarily difficult to obtain by prescribing elaborate procedural guidelines. The constitutional basis for the decisions rested upon the conclusion that the Fourteenth Amendment right of personal privacy embraced a woman's decision whether to carry a pregnancy to term. The Court noted that its prior decisions had "found at least the roots of ...[a] guarantee of personal privacy" in various amendments to the Constitution or their penumbras (i.e., protected offshoots) and characterized the right to privacy as grounded in "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action." Roe v. Wade, 410 U.S. 113, 152, 153 (1973). Regarding the scope of that right, the Court stated that it included "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty'" and "bears some extension to activities related to marriage, procreation, contraception, family relationship, and child rearing and education." Id. at 152-153. Such a right, the Court concluded, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id. at 153.

With respect to protection of the right against State interference, the Court held that since the right of personal privacy is a fundamental right, only a "compelling State interest" could justify its limitation by a state. Thus while it recognized the legitimacy of the state interest in protecting maternal health and the preservation of the fetus' potential life, *Id*. at 148-150, and the existence of a rational connection between these two interests and the state's anti-abortion law, the Court held these interests insufficient to justify an absolute ban on abortions. Instead, the Court emphasized the durational nature of pregnancy and held the state's interests to be sufficiently compelling to permit curtailment or prohibition of abortion only during specified stages of pregnancy. The High Court concluded that until the end of the first trimester an abortion is no more dangerous to maternal health than childbirth itself, and found that:

> [W]ith respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in light of present medical knowledge, is at approximately the end of the first trimester. *Id*. at 163.

Only after the first trimester does the state's interest in protecting maternal health provide a sufficient basis to justify State regulation of abortion, and then only to protect this interest. *Id*. at 163-164.

The "compelling" point with respect to the state's interest in the potential life of the fetus "is at viability." Following viability, the state's interest permits it to regulate and even proscribe an abortion except when necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. *Id*. at 163-164. The Court defined viability as the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." *Id*. at 160. The Court summarized its holding as follows:

> (a) For the stage prior to approximately the end of the first trimester [of pregnancy], the abortion decision

> and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.
>
> 410 U.S. at 164-165

In Doe v. Bolton, 410 U.S. 179 (1973), the Court reiterated its holding in Roe v. Wade that the basic decision of when an abortion is proper rests with the pregnant mother and her physician, but extended Roe by warning that just as states may not prevent abortion by making the performance a crime, states may not make abortions unreasonably difficult to obtain by prescribing elaborate procedural barriers. In Doe, therefore, the Court struck down state requirements that abortions be performed in licensed hospitals; that abortions be approved beforehand by a hospital committee; and that two physicians concur in the abortion decision. Id. at 196-199. The Court appeared to note, however, that this would not apply to a statute that protected the religious or moral beliefs of denominational hospitals and their employees. Id. at 197-98.

The Court in Roe also dealt with the question whether a fetus is a person under the Fourteenth Amendment and other provisions of the Constitution. The Court indicated that the Constitution never specifically defines "person," but added that in nearly all the sections where the word person appears, "...the use of the word is such that it has application only post-natally. None indicates, with any assurance, that it has any possible pre-natal application." 410 U.S. at 157. The Court emphasized that given the fact that in the major part of the 19th century prevailing legal abortion practices were far freer than today, the Court was persuaded "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Id.* at 158.

The Court did not, however, resolve the question of when life actually begins. While noting the divergence of thinking on this issue, it, instead, articulated the legal concept of "viability," which is defined as the point at which the fetus is potentially able to live outside the womb, although the fetus may require artificial aid. *Id.* at 160.

B. U.S. Supreme Court Decisions Subsequent to Roe and Doe Involving the Substantive Right To Abortion

(1) Informed Consent, Spousal Consent, Parental Consent, and Reporting Requirements

In *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976), the Court held that informed consent statutes, which require a doctor to obtain the written consent of a woman after informing her of the dangers of abortion and possible alternatives, are constitutional if the requirements are related to maternal health and are not overbearing. 428 U.S. 52, 65-66. The fact that the informed consent laws must define their requirements very narrowly in order to be constitutional was later confirmed by the Supreme Court in 1979 when it summarily affirmed an Eighth Circuit Court of Appeals decision holding to that effect in *Freiman v. Ashcroft*, 584 F. 2d 247, 251 (8th Cir. 1978) *aff'd mem.*, 99 S. Ct. 1416 (1979). The requirements of an informed consent statute must also be narrowly drawn so as not to unduly interfere with the physician-patient relationship, although the type of information required to be given to a woman of necessity may vary according to the trimester of her pregnancy.

In addition to informed consent, the Danforth decision dealt with the issue of spousal consent. The Supreme Court found that spousal consent statutes, which require a written statement by the father of the fetus affirming his consent to the abortion, are unconstitutional if the statutes allow the husband to unilaterally prohibit the abortion in the first trimester. 428 U.S. 52, 69. It should be noted that on the same day that the Supreme Court decided Danforth, it also summarily affirmed the lower court decision in Coe v. Gerstein, 376 F. Supp. 695 (S.D. Fla. 1974), aff'd, 428 U.S. 901 (1976), which held unconstitutional a spousal consent law regardless of the stage of the woman's pregnancy.

With respect to parental consent statutes, the Supreme Court held in Danforth that those statutes that allow a parent or guardian to absolutely prohibit an abortion to be performed on a minor child were unconstitutional. Subsequently, in Bellotti v. Baird, 443 U.S. 622 (1979), the Court ruled that while a state may require a minor to obtain parental consent, the state must also provide an alternative procedure to procure authorization if parental consent is denied or the minor does not want to seek it. From the reasoning used in Bellotti, it appears that the Court felt a minor is entitled to some proceeding which allows her to prove her ability to make an informed decision independent of her parents, or that even if she is incapable of making the decision, at least showing that the abortion would be in her best interests.

The Court in Danforth also ruled that reporting requirements in statutes requiring doctors and health facilities to provide information to states regarding each abortion performed, are constitutional. The Court specified, however, that these reporting requirements relate to maternal health, remain confidential, and may not be overbearing. 428 U.S. 52, 80-81.

Another aspect in the Danforth case related to the constitutionality of abortion procedure statutes that prohibit the use of saline amniocentesis to obtain an abortion. The Court held such statutes unconstitutional because it believed that a procedure so widely accepted in medical circles as that requiring the use of saline amniocentesis could not be prohibited. Moreover, the state statute in question was held to be inconsistent in its proscription, since it allowed other more dangerous procedures while prohibiting some that were safer, more effective, and more widely accepted by the medical profession.

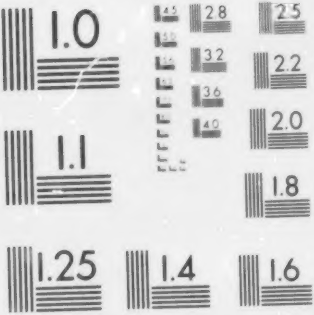
Finally, another significant ruling made by the Court in Danforth was that fetal protection statutes were generally overbroad and unconstitutional if they pertained to pre-viable fetuses. Such statutes require a doctor performing an abortion to use available means and medical skills to save the life of the fetus. In a subsequent decision, Colautti v. Franklin, 439 U.S. 379 (1979), the Supreme Court held that such fetal protection statutes could only apply to viable fetuses and that the statute must be precise in setting forth the standard for determining viability. In addition, the Court in Colautti stressed that in order to meet the constitutional test of sufficient certainty, fetal protection laws had to define whether a doctor's paramount duty was to the patient or whether the physician had to balance the possible danger to the patient against the increased odds of fetal survival. 439 U.S. 379, 397-401.

(2) *Parental Notice*

The Supreme Court did attempt to provide further clarification of the parental consent and notification issues in its decision in *Bellotti v. Baird*, 443 U.S. 622 (1979). There the Court held unconstitutional a Massachusetts statute that required *parental consultation or notification* in every instance without affording the pregnant minor an opportunity to receive an independent judicial determination that she was mature enough to consent or that the abortion would be in her best interests. The Court also found unconstitutional a statutory provision that permitted judicial authorization for an abortion to be withheld from a minor who is found by the court to be mature and fully competent to make the decision whether or not to terminate her pregnancy independently. However, in an effort to provide some future guidelines, the Court, *in dicta*, suggested that if a State wished to use parental notification, it must afford the minor the option of proceeding directly to court, without parental notification, where she must show that she is a mature minor or that, if she is found not able to make the decision independently, the desired abortion is in her best interests. Four of the eight justices objected to this suggestion on the ground that it was an advisory opinion.

On March 23, 1981, the Court upheld a Utah State law making it a crime for doctors to perform an abortion on an unemancipated, dependent minor without notifying her parents. In *H.L. v. Matheson*, 450 U.S. 398 (1981), a 6-to-3 decision, the Court examined the narrow question of the facial constitutionality of a statute requiring a physician to give notice to parents, "if possible," prior to performing an abortion on their minor daughter, (a) when the girl is living with and dependent upon her parents, (b), when she is not emancipated by marriage or otherwise, and (c) when she has made no claim or showing as to her maturity or as to her relationship with her parents. The Supreme Court cited the interest in preserving family integrity and protecting adolescents in allowing states to require that parents be informed that their daughter is seeking an abortion, and emphasized that the statute in question did not give a veto power over the minor's abortion decision. Chief Justice Burger reasoned that the Utah law, "as applied to immature and dependent minors ... serves the important considerations of family integrity and protecting adolescents." In addition, parental notice provides "... an opportunity for parents to supply essential medical and other important information to a physician. The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature." The Court rejected the minor woman's contention that abortion was being singled out for special treatment in contrast to other surgical procedures, like childbirth, which do not require parental notice. The Chief Justice responded that the situations differed and "if the pregnant girl elects to carry her child to term, the medical decisions to be made entail few -- perhaps none — of the potentially grave emotional and psychological consequences of the decision to abort." Thus, the Court found the Utah law to be constitutional, since it served important state interests, was narrowly drawn to protect only those interests, and did not in any way violate any of the guarantees of the Constitution.

One issue left unanswered by the Supreme Court in this context concerns the validity of spousal notice laws. A decision by the Fifth Circuit in Scheinberg v. Smith, 50 U.S.L.W. 2258 (Nov. 3, 1981), held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that the state's interest in regulating the integrity of marital and familial life, together with its interest in ensuring that its state-created vehicle for procreation, marriage, not be abused through one spouse perpetually and secretively frustrating the other's desire for offspring, is sufficiently compelling to allow the state to require a wife to inform her husband when she is contemplating termination of her pregnancy. However, the appeals court remanded its case to the district court to determine whether proper abortion procedures have the potential to affect adversely a woman's future procreative ability. If so, the court indicated that it would sustain a notice requirement whether or not the husband is the father of the fetus.

(3) Advertisement of Abortion Services

The Supreme Court held in Bigelow v. Virginia, 421 U.S. 809 (1975), that a state may not proscribe advertising regarding the availability of an abortion or abortion-related services in another state. The Court found that the statute in question was unconstitutional because the state of Virginia, where the advertisement appeared, had only a minimal interest in the health and medical practices of New York, the state in which the legal abortion services were located.

(4) Abortions by Non-Physicians

In Connecticut v. Menillo, 429 U.S. 9 (1975), the Supreme Court ruled that state statutes similar to the Texas law challenged in Roe were constitutional to the extent that the statutes forbid non-physicians from performing abortions. The Roe decision made it clear that a state could not interfere with a woman's decision, made in consultation with and upon the advice of her doctor, to have an abortion in the first trimester of her pregnancy. The *Menillo* Court found that pre-*Roe* restrictive abortion laws were still enforceable against non-physicians. 423 U.S. 9, 11.

(5) *Abortions in Public and Private Hospitals*

In *Poelker v. Doe*, 432 U.S. 519 (1977) (*per curiam*), the Supreme Court held that the policy of the City of St. Louis in refusing to allow the performance of non-therapeutic abortions in its public hospitals, and of staffing those hospitals with personnel opposed to the performance of abortions, did not violate the equal protection clause of the Constitution. *Poelker*, however, did not deal with the question of private hospitals and their authority to prohibit abortion services. In *Poelker*, the Court dealt with the right of a municipality to elect to provide publicly financed hospital services for childbirth without providing corresponding services for non-therapeutic abortions. The Court approved this practice.

No cases have been reported challenging state laws which allow doctors to refuse to participate in abortion procedures. This may be explained by the fact that a woman can always seek out another physician who could perform an abortion, should a doctor initially refuse because of religious or other beliefs.

To date the Supreme Court has not rendered a decision regarding the constitutionality of state statutes that allow private hospitals to refuse to participate in abortions; however, federal district courts have ruled on this issue. See, e.g., *Jones v. Eastern Me. Med. Center*, 448 F. Supp. 1156 (D. Me. 1978), where the court upheld such a law.

(6) The Definition of Viability

The Supreme Court's articulation of the concept of viability has required further elaboration, particularly with regard to the critical question of who defines at what point a fetus has reached viability. In Roe the Court defined viability as the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." 410 U.S. at 160. Such potentiality, however, must be for "meaningful life" and this cannot encompass simply momentary survival. 410 U.S. at 163. The Court also noted that while viability is usually placed at about 28 weeks, it can occur earlier and essentially left the point flexible for anticipated advances in medical skill. Finally, Roe stressed the central role of the pregnant woman's doctor, emphasizing that "the abortion decision in all its aspects is inherently, and primarily, a medical decision." 410 U.S. at 160. Similar themes were stressed in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), in which a Missouri law, which defined viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life support systems", was attacked as an attempt to advance the point of viability to an earlier stage of gestation. The Court disagreed, finding the statutory definition consistent with Roe. It re-emphasized that viability is "a matter of medical judgment, skill, and technical ability and that Roe meant to preserve the flexibility of the term. 428 U.S. at 64. Moreover, the Danforth Court held that "it is not the proper function of the legislature or the courts to place viability, which is essentially a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the attending physician." 428 U.S. at 64. The physician's central role in determining viability and the lack of such definitional authority in the legislatures and courts, was most recently reaffirmed by the Court in *Colautti* v. *Franklin*, 439 U.S. 379 (1979).

C. *U.S. Supreme Court Decisions — 1983 TERM*

On June 15, 1983, the U.S. Supreme Court decided three cases involving several different abortion questions: *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 51 U.S.L.W. 4767; *Planned Parenthood Association of Kansas City*, *Missouri, Inc.* v. *Ashcroft*, 51 U.S.L.W. 4783, and *Simopoulos* v. *Virginia*, 51 U.S.L.W. 4791. The ruling in the *City of Akron* case formed the basis for the other two decisions. These three decisions resolved some of the unanswered questions that arose after *Roe v. Wade* was decided in 1973.

In *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 51 U.S.L.W. 4767, (hereinafter referred to as *City of Akron*), the Supreme Court in a 6 to 3 vote declared that five sections of the Akron ordinance restricting the right of a woman to an abortion were unconstitutional. Justice Powell wrote the opinion of the Court, and he was joined by Chief Justice Burger, Justices Brennan, Marshall, Blackmun, and Stevens. Justice O'Connor filed a dissenting opinion in which Justices White and Rehnquist joined.

The five sections of the municipal ordinance regulating abortion involved in the constitutional challenge were Akron Codified Ordinances ch. 5, 1870.03, 1870.05, 1870.06, 1870.07 and 1870.16. The provisions of each challenged section are summarized below:

(1) 1870.03 — that after the first trimester of pregnancy, all abortions be performed in a hospital;

> (2) 1870.05 — that there be notification of and consent by parents before abortions may be performed on unmarried minors;
> (3) 1870.06 — that the attending physician make certain specified statements to the patient so that the resulting consent for an abortion would amount to informed consent;
> (4) 1870.07 — that there be a 24 hour waiting period between the time the patient signs the consent form and when the physician performs the abortion; and
> (5) 1870.16 — that fetal remains be disposed of in a "humane and sanitary manner."

For the exact wording and specific details of these provisions, see 51 U.S.L.W. 4767, footnotes 3-7 at pp. 4768-4769.

In striking down all of the foregoing sections of the Akron ordinance as being violative of the U.S. Constitution, the Court at the very outset reaffirmed its 1973 decision, Roe v. Wade, 410 U.S. 113, and proceeded to analyse each section of the Akron ordinance within the trimester framework established by that ruling. During the first trimester, a woman must be free in consultation with her doctor to reach a decision to have an abortion absent governmental interference. In City of Akron, the Court does point out that a state may enact some regulation applicable to the first trimester of pregnancy, but it cannot have a significant impact on the woman's right to decide to terminate her pregnancy and must be justified by important state health objectives. The important point concerning state regulation in the first trimester is that there be no interference with (1) doctor-patient consultation or (2) the woman's choice between abortion and childbirth. City of Akron, 51 U.S.L.W. 4767, at p. 4771.

The challenged Akron ordinance provision relating to where abortions can be performed pertains specifically to second trimester abortions. The requirement stated that any second trimester abortion had to be performed in a full-service hospital. The accreditation of these facilities required compliance with comprehensive standards governing an extensive variety of health and surgical services. The result was that abortions under this section of the Akron ordinance could not be performed in outpatient entities that were not part of an acute-care, full service hospital. The Court found this restriction unconstitutional. The Court noted that the possibility of having to travel to find facilities could result in both financial expense and added risk to a woman's health. *Id.* at p. 4772. The Court also cited changed medical circumstances, and the availability of safer procedures for performing second trimester abortions since *Roe*, for its conclusion that the Akron hospitalization requirement imposed an unreasonable burden on a woman's right to an abortion.

The Court also invalidated the provision in the Akron ordinance which prohibited a doctor from performing an abortion on an unemancipated minor unless he got "the informed written consent of one of her parents or her legal guardian" or unless the minor herself obtained "an order from a court having jurisdiction over her that her abortion be performed or induced." *Id.* at p. 4773. The Court relied on its earlier rulings in *Danforth* and *Bellotti II* to conclude that the City of Akron could "not make a blanket determination that *all* minors under the age of 15 are too immature to make this decision or that an abortion never may be in the minor's best interests without parental approval." *Id.* (Emphasis in original text). Moreover, the Akron ordinance's provision concerning parental approval did not create expressly the alternative judicial procedure required by *Bellotti II*. The Court refused to incorporate the procedures of an Ohio statute governing juvenile proceedings because it had nothing to do with minors' abortions. Thus, the Akron ordinance's consent provision had to fall because it foreclosed any possibility for "case-by-case evaluations of the maturity of pregnant minors." *Id.* at p. 4774, quoting Bellotti II, 443 U.S., at 643, n. 23 (plurality opinion).

In *City of Akron*, the Supreme Court also struck down the informed written consent section of the ordinance. This provision required that the attending doctor orally inform the woman "of the status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide her with assistance and information with respect to birth control, adoption, and childbirth." *Id*. at p. 4774. The attending physician was also required to tell his patient of the risks involved and any other information which in his medical judgement would be critical to her decision of whether to terminate the pregnancy. The Court found this informed consent requirement to be constitutionally unacceptable because it essentially gave the government unreviewable authority over what information was to be given a woman before she decided whether to have an abortion. In *City of Akron*, the Court found that the city's regulation concerning informed consent exceeded permissible limits. *Id*. In addition, it was also objectionable because it intruded upon the discretion of the pregnant woman's doctor. *Id*. at p. 4775. The Court also objected to that portion of the ordinance's informed consent requirement which stated that the "attending physician" had the responsibility of informing the patient because of the availability of numerous other sources for obtaining the necessary information and counseling. *Id*. at p. 4776.

In *City of Akron*, the Supreme Court also chose to invalidate the twenty-four hour waiting period. *Id*. The Court found that the City of Akron had not shown that any legitimate state interest was being served "by an arbitrary and inflexible waiting period." *Id*. Writing for the majority, Justice Powell noted that there was "no evidence suggesting that the abortion procedure will be performed more safely" because of a twenty-four hour waiting period. *Id*.

Finally, the Court ruled that the portion of the Akron ordinance requiring that physicians performing abortions see to it that the remains of the unborn child be disposed "in a humane and sanitary" way was void for vagueness. The level of uncertainty present was unacceptable in a situation such as this where there was the prospect of criminal liability being imposed. *Id.* This provision violated the Due Process Clause.

Justice O'Connor wrote a dissent in *City of Akron*, and she was joined by Justices White and Rehnquist. The dissenting opinion basically took issue with the trimester framework in *Roe v. Wade*. *Id.* at 4777 *et seq.*

In *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, 51 U.S.L.W. 4783, (hereinafter referred to as *Ashcroft*), the Supreme Court invalidated Missouri's second trimester hospitalization requirement by the same 6 to 3 vote as in *City of Akron*; however, the Court voted 5 to 4 to uphold three other sections of that Missouri law.

The following Missouri statutory provisions were challenged on constitutional grounds:

(1) 188.025 — requiring that after twelve weeks of pregnancy, abortions be performed in a hospital;
(2) 188.047 — mandating that there be a pathology report for each abortion performed;
(3) 188.030 — requiring the presence of a second physician during abortions that are performed after viability; and
(4) 188.028 — requiring that minors obtain parental consent or consent from the juvenile court for an abortion.

With respect to the requirement that all second trimester abortions be performed in a full service hospital, the Supreme Court held that its decision and rationale for invalidating such requirement in *City of Akron* was controlling. *Ashcroft*, 51 U.S.L.W. 4783, at pp. 4784-4785.

The Supreme Court, however, found that the second-physician requirement during the third trimester in *Ashcroft* was permissible under the Constitution because it "reasonably furthers the State's compelling interest in protecting the lives of viable fetuses,..." *Id.* at p. 4786.

The Court also upheld the pathology report requirement. This provision was "related to generally accepted medical standards" and "further(s) important health-related State concerns." *Ashcroft*, 51 U.S.L.W. 4783, at p. 4786, quoting *City of Akron* Slip Opinion at p. 12. The Court further found that the cost of the tissue examination "does not significantly burden a pregnant woman's abortion decision." *Id.* at p. 4787

The Supreme Court in *Ashcroft* also upheld Missouri's parental consent requirement. *Id.* at pp. 4787-4788. It distinguished the provision involved here from that challenged in the *City of Akron* case. The Missouri requirement, unlike the Akron one, did provide an alternative procedure by which a pregnant immature minor could show in court that she was sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests.

In *Ashcroft*, Justice Blackmun wrote a separate opinion concurring in the judgment invalidating the hospital requirement for all second trimester abortions but dissenting with respect to the Court's other findings upholding the remaining provisions in question in the Missouri law. He was joined by Justices Brennan, Marshall and Stevens. 51 U.S.L.W. at 4788-4790.

Justice O'Connor, joined by Justices White and Rehnquist, concurred in part and dissented in part. Justice O'Connor emphasized that for the same reasons she dissented in *City of Akron* regarding the hospital requirement for second trimester abortions, she is dissenting here. They concurred with respect to the Court's upholding the other sections of the Missouri law: the second-physician requirement, pathology report requirement, and parental consent provision. However, they used a different rationale, one that did not utilize the trimester framework of Roe v. Wade. 51. U.S.L.W. at 4790-4791.

In Simopoulos v. Virginia, 51 U.S.L.W., 4791 (hereinafter referred to as Simopoulos), the Supreme Court in an 8 to 1 decision ruled that Virginia's mandatory hospitalization requirement for second trimester abortions is constitutional. As in City of Akron and Ashcroft, Justice Powell wrote the opinion for the Court. Justice Stevens dissented. The Court distinguished the requirement in question in Virginia from those it invalidated in City of Akron and Ashcroft. The determination upholding the Virginia provision actually turned on the definition of "hospital".

Justice Stevens wrote a dissenting opinion in Simopoulos pointing out that the Virginia law could be interpreted in either of two ways: (1) to prohibit all second trimester abortions except those performed in a full service hospital or (2) to permit any abortion performed in a facility licensed as a "hospital" in conformity with Virginia's Department of Health regulations. The Court chose the second interpretation. Justice Stevens disagreed. Stevens Dissent, Simopoulos, 51 U.S.L.W. 4791, at p. 4795. His disagreement stemmed primarily from his belief that it is not the Supreme Court's role to interpret state law.

Justice O'Connor wrote a separate concurrence, and she was joined by Justices Rehnquist and White. Her reasoning, however, was not based on the trimester framework of Roe v. Wade. She stated: "Rather, I believe that the requirement in this case is not an undue burden on the decision to undergo an abortion." O'Connor, Concurrence, Simopoulos, 51 U.S.L.W. 4791, at p. 4794.

In summary, the 1983 Supreme Court decisions in *City of Akron*, *Ashcroft*, and *Simopoulos* settled questions relating to hospital requirements for second trimester abortions, informed consent requirements, waiting periods, parental notification and consent, and disposal of fetal remains. The Supreme Court reaffirmed its decisions in *Roe v. Wade* and its intention to continue to follow the trimester framework balancing a woman's constitutional right to decide whether to terminate a pregnancy with the state's interest in protecting potential life. The state's interest in protecting potential life becomes "compelling" at the point of viability, i.e., when the fetus can exist outside of a woman's womb either on its own or through artificial means. The definition of viability is the one used by the Court in its *Roe v. Wade* decision in 1973.

II. The Public Funding of Abortions: Current State of the Law

Two categories of public funding cases have been heard and decided by the Supreme Court: (1) those involving funding restrictions for non-therapeutic (elective) abortions and (2) those involving funding limitations for therapeutic (medically necessary) abortions.

A. The 1977 Trilogy — Restrictions on Public Funding of Non-therapeutic or Elective Abortions

On June 20, 1977, the Supreme Court, in three related decisions, ruled on the question whether the Medicaid statute or the Constitution requires public funding of non-therapeutic (elective) abortions for indigent women or access to public facilities for the performance of such abortions. The Court held that the states have neither a statutory nor a constitutional obligation in this regard. *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); and *Poelker v. Doe*, 432 U.S. 519 (1977) (*per curiam*).

In Beal v. Doe, the Supreme Court dealt with the question of whether Title XIX of the Social Security Act required the funding of non-therapeutic abortion as a condition of participation in the Medicaid program established by the Act. The Court held that nothing in the language or legislative history of Title XIX requires a participating state to fund every medical procedure falling within the delineated categories of medical care. Each state is given broad discretion to determine the extent of medical assistance that is "reasonable" and "consistent with the obligations" of Title XIX. The Court ruled that it was not inconsistent with the Act's goals to refuse to fund unnecessary medical services. The Court recognized the state's interest in encouraging normal childbirth and found no congressional intent to undercut that interest by subsidizing the costs of non-therapeutic abortions. However, the Court did indicate that Title XIX left a state free to include coverage for non-therapeutic abortions should it choose to do so.

In Maher v. Roe, the Supreme Court resolved a constitutional challenge to Connecticut's refusal to reimburse Medicaid recipients for abortion expenses except where the attending physician certifies the abortion to have been medically or psychiatrically necessary. The Court held that the Equal Protection Clause does not require a state participating in the Medicaid program to pay expenses incident to non-therapeutic abortions simply because the state has made a policy choice to pay expenses incident to childbirth. More particularly, Connecticut's policy of favoring childbirth over abortion was held not to impinge upon the fundamental right of privacy recognized in Roe v. Wade, which protects a woman from undue interference in her decision to terminate a pregnancy. According to the Court, the state's choice did not handicap an indigent woman desiring an abortion, since she could continue, as before, to look to private abortion services and private sources of funding. In essence, the Court found no absolute bar for an indigent woman seeking an abortion.

In *Poelker v. Doe*, the Court upheld a regulation of the municipalities of St. Louis that denied indigent pregnant women non-therapeutic abortions at public hospitals. In an unsigned *per curiam* opinion, the Court stated that it held "for the reasons stated in *Maher*, that the Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth as St. Louis has done." 432 U.S. at 521.

B. The Public Funding of Therapeutic or Medically Necessary Abortions — The Supreme Court's Decisions in McRae and Zbaraz

The 1977 Supreme Court decisions left open the question whether federal law, such as the Hyde Amendment, or similar state laws, could validly prohibit governmental funding of therapeutic abortions.

On June 30, 1980, in a 5-4 decision, the U.S. Supreme Court ruled that the Hyde Amendment's abortion funding restrictions were constitutional. The Court's majority found that the Hyde Amendment neither violated the due process or equal protection guarantees of the Fifth Amendment nor the Establishment Clause of the First Amendment. The Court also upheld the right of a state participating in the Medicaid program to fund only those medically necessary abortions for which it received federal reimbursement. *Harris v. McRae*, 448 U.S. 297 (1980). In companion cases raising similar issues, the Court held that a State of Illinois statutory funding restriction comparable to the federal Hyde Amendment also did not contravene the constitutional restrictions of the equal protection clause of the Fourteenth Amendment. *Williams v. Zbaraz*; *Miller v. Zbaraz*; *U.S. v. Zbaraz*, 448 U.S. 297

(1980). The Court's rulings in *McRae* and *Zbaraz* mean there is no statutory or constitutional obligation on the states or the federal government to fund all medically necessary abortions.

III. A Review of the Relevant U.S. Supreme Court Decisions Involving the Question of Whether Pregnancy Discrimination Is Legally Proscribed Sex Discrimination

For the puposes of this analysis, the following three Supreme Court decisions involving pregnancy are most relevant: *Geduldig v. Aiello*, 417 U.S. 484 (1974), *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 51 U.S.L.W. 4837, (June 20, 1983). At the outset, we shall discuss the constitutional analysis the Court has applied under the Fourteenth Amendment's equal protection clause. Since the ERA is only in proposed form, without a fully developed legislative history and court decisions interpreting it, the Fourteenth Amendment and contemporaneous court rulings with respect to sex discrimination may provide guidance as to how the Supreme Court may apply the ERA.

The Fourteenth Amendment provides that no state may "deny to any person within its jurisdiction the equal protection of the laws." While the Fifth Amendment, which binds the federal government, contains no express equal protection clause, the Supreme Court has held that its proscription against denying any person "life, liberty or property, without due process of law" incorporates an equal protection principle that, in most cases, requires the national government to observe the same strictures on classification and discrimination that the states must follow. E.g. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

When the legislature passes laws, it makes classifications. Not all classifications are prohibited by the Constitution. A legislature does have considerable discretion in recognizing the differences between and among persons and situations. The Supreme Court has expressly explained that, "statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." Ferguson v. Skrupa, 372 U.S. 726, 732 (1963).

Recognition of the fact that equal protection does not deny the right of classification, however, leads to the more difficult question of how it is that a court may determine whether a classification is proper or improper, i.e. whether a classification constitutes invidious discrimination. Behind this determination is the presumption of constitutionality which a court accords to legislative and administrative action, especially the deference a court owes to the legislative branch. In terms of standards of review, the Supreme Court adopted very early the "rational basis" test, under which so long as a classification has any rational basis whatever, as long as it is not wholly arbitrary, the court will find no violation of equal protection.

There are actually two different formulations of the rational basis test. One is derived from Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), and this one is so extremely deferential that hardly anything would fail to survive a challenge. The second formulation can be traced to Royster Guano Co. v. Virginia, 253 U.S. 412 (1920), which, though deferential, does leave to the courts some role in actually scrutinizing classifications. Over the years, one or the other test has been utilized by the Supreme Court. The present Court, however, is closely and inconclusively divided with respect to which to apply. Compare United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980), with Schweiker v. Wilson, 450 U.S. 221 (1981); and see City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 294 (1982), and id., 296-297 (Justice White), 301-302 (Justice Powell).

In any event, the rational basis test generally states that as long as a classification is rationally related to some legitimate or permissible governmental interest, then the classification will survive an equal protection challenge. Using this test, the Court had sustained a classification which had an adverse impact on women. See Goesaert v. Cleary, 335 U.S. 464 (1948) (ban on women as bartenders, except for the wives or daughters of male owners); Hoyt v. Florida, 368 U.S. 57 (1961) (law required jury service of men but gave women option to serve or not). When in Reed v. Reed, 404 U.S. 71 (1971), the Court for the first time held invalid a sex classification it purported to rely on the rational basis test, but many saw in this opinion something less deferential.

Although it took the Supreme Court quite a number of years to state the test explicitly, the Court has developed a strict standard of review when racial classifications are in issue. Loving v. Virginia, 388 U.S. 1, 11 (1967). Thus, when government classifies on the basis of a "suspect" standard (or when it classifies with regard to a "fundamental" interest), it must justify those classifications by showing a compelling interest necessitating the action and that the distinctions are necessary to reach the purpose sought to be furthered. See San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). However, even when a racial classification is used, there may be the requisite showing to sustain it. *Lee v. Washington*, 390 U.S. 333 (1968) (preservation of discipline and order in a jail might justify racial segregation if shown to be necessary).

The Supreme Court has also adopted an "intermediate" standard for certain classifications, one less deferential than the rational basis test and one less strict (and one less fatal) than the "suspect class - fundamental interest" test. There actually may be a range of intermediate tests. This appears to be the situation judging from the opinions dealings with classifications on the basis of sex, alienage, and illegitimacy.

In the gender context, sex classifications must, in order to withstand constitutional challenge, "serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Mississippi University for Women v. Hogan*, 102 S. Ct. 3331, 3337 (1982). Four Justices, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), were prepared to hold sex a suspect classification; three Justices declined on the basis that such a holding was premature as long as the Equal Rights Amendment was pending, and in any event, they thought the classification at issue failed the rational basis test. An eighth Justice voted to strike down the classification without explicitly stating a test, and the ninth Justice dissented. In her opinion for the Court in *Mississippi University for Women* v. *Hogan* *supra*, 3336, n. 9, Justice O'Connor appeared to leave open the possibility that sex may yet be declared a suspect classification.

The intermediate standard is applicable and is the same whether women or men are disadvantaged by the classification. *Orr v. Orr*, 440 U.S. 268, 279 (1979); *Mississippi University for Women* v. *Hogan*, *supra*, 3336, although

Justice Rehnquist and Chief Justice Burger have argued that when males are disadvantaged only the rational basis test is appropriate. *Craig v. Boren*, *supra*, 218-221; *Califano v. Goldfarb*, 430 U.S. 199, 224 (1977). However, the standard used to evaluate ostensibly "benign" classification, i.e. classifications expressly sex-based designed to compensate women for past discrimination, is in flux. At first, the rational basis test was applied to sustain such enactments, despite the improbable character of the compensatory rationales advanced by the government. *Kahn v. Shevin* 416 U.S. 351 (1974); *Schlesinger v. Ballard*, 419 U.S. 498 (1975). Later cases have applied the intermediate test, finding that if in fact a statute is "deliberately enacted to compensate for particular economic disabilities suffered by women", it serves an important governmental objective and will be sustained if it is substantially related to achievement of that objective. *Califano v. Webster*, 430 U.S. 313, 316-318, 320 (1977). See *Orr v. Orr*, *supra*, 280-282; *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150-152 (1980); *Mississippi University for Women v. Hogan*, *supra*, 3338-3340.

One further point needs to be made concerning the Supreme Court's standard of review analysis for challenges under the equal protection clause of the Fourteenth Amendment. That is, the party contending that the government discriminated has the burden of proving that there was a pretext or intent for the discrimination. The intent requirement of equal protection litigation is applicable in sex classification cases. In other words, a law which is neutral on its face and which serves ends within the power of government to pursue is not invalid simply because it may affect a greater proportion of one sex than of the other. Discriminatory purpose, motive, animus, or intent must be shown. It must be established that the decisionmaker selected or reaffirmed a particular course of action, at least in part because of, not merely in spite of, its adverse effects on an identifiable group. Thus, a veterans' preference law which benefited largely but not exclusively men and which had a severe impact mostly but not totally on women was held not invalid under the equal protection clause. *Massachusetts Personnel Comm. v. Feeney*, 442 U.S. 256 (1979). In *Feeney*, the complaining party did not show that the government intended to discriminate against women.

In *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Court rejected a claim that a California income insurance plan, which excluded disability resulting from normal pregnancy, was unconstitutional because it violated the equal protection clause of the Constitution. The Court concluded that the exclusion of pregnancy was a permissible means for achieving the legitimate state purpose of maintaining a low-cost, employee supported insurance plan. The Court found that the California plan's exclusion did not amount to sex discrimination absent a showing that it was a pretext for invidious discrimination.

Aiello was decided on equal protection grounds. A reading of *Aiello* indicated that the Court recognized that pregnancy was related to sex; however, it refused to go so far as to rule that this classification constituted gender discrimination of the *Reed* or *Frontiero* variety. The majority noted in footnote that,

> ...The California insurance program does not exclude anyone from benefit eligibility *because of gender* but merely removes one physical condition — pregnancy — from the list of compensable disabilities.

> While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics...
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. *The program divides potential recipients into two groups — pregnant women and nonpregnant persons*. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.
>
> (*Id*. n. 20 at 496-497.) (Emphasis supplied.)

In the text of the opinion itself, the Court emphasized that, "There is no risk from which men are protected and women are not. Likewise there is no risk from which women are protected and men are not." *Id*. at 496-497.

In December, 1976, the Court decided *General Electric Co. v. Gilbert*, 429 U.S. 125. In *Gilbert*, the Court effectively overruled the unanimous conclusion of six courts of appeals by holding that the exclusion of pregnancy related disability from an otherwise comprehensive, privately funded, employee disability benefits plan did not constitute sex discrimination prohibited by Title VII of the 1964 Civil Rights Act. The majority in *Gilbert* relied heavily upon the Court's prior decision in *Aiello*, *supra*. In so doing, it refused to extend the judicial theory which measures the legality of employment practices under Title VII in terms of their "consequences" or "effects" to the pregnancy exclusion at issue in *Gilbert*.

Gilbert involved a company financed program whereby General Electric provides weekly non-occupational sickness and accident benefit payments to all of its employees in an amount equal to 60 percent of an employee's straight time weekly wage up to a maximum benefit of $150 per week for each week the employee is absent from and unable to work on account of any disability resulting from nonoccupational accident or sickness for a period up to and including 26 weeks for any one continuous period of disability or successive period of disability due to the same or related cause. The plan covers all disabilities of male employees, including those caused by voluntary medical procedures, self-inflicted injuries, injuries sustained in sports and fights, alcoholism and drug addiction. The only disabilities not covered by the plan are those arising from pregnancy, miscarriage or childbirth. Excluded from coverage also are non-pregnancy related medical conditions or accidents occurring while an employee is on pregnancy leave.

Justice Rehnquist wrote the Supreme Court's opinion for the *Gilbert* majority in which he was joined by the Chief Justice and Justices Stewart, White, Powell, and Blackmun. Justices Stewart and Blackmun also filed separate concurring opinions. Justice Marshall joined Justice Brennan in dissent and Justice Stevens dissented separately.

In reversing the Fourth Circuit, the Supreme Court majority disagreed with the appeals court's basic contention that the equal protection analysis of the pregnancy exclusion in *Aiello* could be disregarded in considering the same issue in *Gilbert* under Title VII. Although impliedly acknowledging that the statutory and constitutional standards may differ, Justice Rehnquist felt that the case law elaborating the constitutional concept of discrimination is a "useful starting point" in ascertaining

Congressional intent with respect to the analogous Title VII concept, particularly since "discrimination" is not defined in Title VII. 429 U.S. 125, 133 (1976). The majority wrote,

> We think, therefore, that our decision in *Geduldig v. Aiello*, *supra*, dealing with a strikingly similar disability plan, is quite relevant in determining whether or not the pregnancy exclusion did discriminate on the basis of sex. *Id.*

The Court in *Gilbert* interpreted *Aiello* as establishing a very fundamental principle — i.e. that the exclusion of pregnancy related disability from the legislative scheme was not to be equated in any sense with sex discrimination *per se*. Pointing to language in *Aiello* indicating a "lack of identity between the excluded disability and gender as such," the majority in *Gilbert* read *Aiello* as meaning that "the exclusion of pregnancy from coverage under California's disability benefits plan was not in itself discrimination based on sex." *Id.* at 135. And insofar as it held that an exclusion of pregnancy from a disability benefits plan providing general coverage is not gender-based discrimination at all, the *Aiello* rationale was applicable in the Title VII context as well. Furthermore, there was, according to the majority, no greater showing in *Gilbert* that the pregnancy exclusion was a "mere pretext" or "subterfuge to accomplish a forbidden discrimination." *Id.* at 136. Although confined to women, pregnancy was significantly different from other diseases or disabilities covered by the plan; indeed, it was not a "disease" at all since it was often-times a "voluntarily undertaken and desired condition." *Id.*

Apart from the issue of pregnancy *per se*, at the time *Gilbert* was decided, it was thought that it may have broader ramifications, perhaps signaling the Court's unwillingness to apply with equal force the *Griggs* test of unlawful discrimination, predicated on the *effects* or *consequences* that employment practices have on protected minorities, to cases of asserted sexually discriminatory conduct. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). However, after the Court decided *Dothard v. Rawlinson*, 433 U.S. 321 (1977), invalidating statutory height and weight requirements for prison guards, it put to rest such conjectures and clarified that the *Griggs* test was in fact still viable in the context of gender-based discrimination.

In *Griggs*, the company had practiced overt racial discrimination prior to enactment of Title VII, but abandoned the policy after the law's adoption. In its place, the company developed a new policy of requiring completion of high school and satisfactory performance on a general intelligence test as a condition to placement in higher paying jobs. In striking down this policy, the Chief Justice noted that whites fared better than blacks and attributed this "consequence" to the "inferior education in segregated schools" received by minority groups. The Court went on to define permissible types of employment criteria in terms of their effects on protected classes under the Act, holding that requirements which are facially neutral but operate in a discriminatory fashion are barred unless justified by business necessity. Title VII was designed to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of...employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and neutral in terms of intent, cannot be maintained if they operate to 'freeze' the *status quo* of prior discriminatory employment practices." Id. at 429-30. The diploma and testing requirements in Griggs were infirm because they were not shown to be job related and had the effect of perpetuating the company's pre-Act discrimination.

The critical aspect of Griggs was its apparent rejection of discriminatory intent as a prerequisite to relief under the Act. "Congress directed the thrust of the Act to the consequences of employment discrimination, not simply the motivation." Id. at 432. The policy in Griggs could not stand, regardless of the motive behind its adoption, because it had a disproportionate adverse impact on minority employees and could not be justified on grounds of business necessity. Thus, Griggs advanced a concept of intentional discrimination bared on the adverse effects that challenged practices have on the employment opportunities of those protected by the Act.

An important point to draw from the foregoing discussion is that the standards which the U.S. Supreme Court applies in situations where the equal protection clause of the Fourteenth Amendment is violated are not necessarily the same as an analysis the Court would set forth when it is dealing with the violation of a statutory prohibition. This is true with respect to both race and sex classifications. In the constitutional context, the Court will go through the application of a particular standard of review — traditional rational basis; intermediate; or active, strict scrutiny — depending upon the facts of the case, the classification involved, and the nature of the discrimination. It is a highly sophisticated approach to ascertaining whether or not a person has been denied equal protection of the laws. When the Court is faced with a case that involves a specific statute, its review of the facts is done in accordance with the wording of the statute which has allegedly been violated.

Significant legal consequences depend upon whether a plaintiff's cause of action derives from the statutory proscription against discrimination or the constitutional guarantee of equal protection. According to the Supreme Court's decision in Washington v. Davis, 426 U.S. 229 (1976), when the plaintiff alleges a statutory violation and the questioned practice has a substantially disproportionate affect upon a protected minority, discriminatory purpose need not be proved. For example, when employment discrimination under Title VII of the Civil Rights Act of 1964, as amended in 1972, is the allegation, once the Title VII plaintiff establishes a prima facie case of discrimination under this disproportionate impact analysis, then the burden shifts to the employer to prove that the disqualifying employment practice is related to the employment in question. While the test under Title VII is one of impact, the test under the equal protection clause of the Fourteenth Amendment is one of intent. Under a constitutional analysis, disproportionate impact is not enough to make out a case of invidious race discrimination. When a plaintiff's challenge rests upon constitutional grounds, he or she must show that the discrimination was purposeful; however, evidence of disproportionate impact is relevant to the question of intent.

As indicated above, the Supreme Court decided General Electric Co. v. Gilbert, supra, in December, 1976. The Court held that the exclusion of pregnancy related disability from an otherwise comprehensive, privately funded, employee disability benefits plan did not constitute sex discrimination prohibited by Title VII of the 1964 Civil Rights Act. The majority in *Gilbert* relied heavily on the Court's prior decision in *Aiello*, *supra*. In so doing, it appeared to have merged the constitutional and statutory standards of review in gender-based cases. Although impliedly acknowledging that the statutory and constitutional standards may differ, the Court felt that the case law elaborating the constitutional concept of discrimination is a "useful starting point" in ascertaining Congressional intent with respect to the analogous Title VII concept, particularly since "discrimination" is not defined in Title VII. 429 U.S. 125, 133 (1976).

These ambiguities, however, were removed when Congress enacted the Pregnancy Discrimination Act of 1978 which effectively overruled the *Gilbert* holding. Pub. L. No. 95-555, 92 Stat. 2076, 42 U.S.C. 2000e(k). It is basically an amendment to Title VII of the 1964 Civil Rights Act adding a new subsection (k), which expands the definition of sex discrimination in the Act to include "pregnancy, childbirth or related medical conditions."[8]

It would be accurate to say that the 1978 amendment to Title VII goes beyond *Gilbert* because it is not limited solely to the pregnancy disability insurance plan situation. Rather, it has a broader effect.

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[8] The only exception to the requirement of equal treatment for pregnant workers is the provision allowing employers a choice in paying for health insurance benefits for abortion in most situations. The provision explicitly states that employers are *not required* to pay for health insurance benefits for abortion, *except* where the life of the mother would be endangered if the fetus were carried to term *or where* "medical complications" have arisen from an abortion.

It prohibits disparate treatment of pregnant women for all employment-related purposes. It makes it clear that sex discrimination under Title VII encompasses pregnancy and pregnancy-related disabilities.

As far as the *Griggs* "effects" test is concerned, the questions raised by the Court's decision in *Gilbert* purporting to merge the constitutional intent requirement with the statutory standard were put to rest by its 1977 ruling in *Dothard v. Rawlinson*, 433 U.S. 321. Here the Court invalidated statutory height and weight requirements for prison guards, and thus, clarified that the *Griggs* test was in fact still viable in the context of gender-based discrimination. In *Dothard*, the Court held that employment requirements for height and weight discriminate illegally against women when statistics show a disproportionate impact on women and when employers fail to demonstrate that the tests have some real relation to the ability to handle the job. *Dothard* clarified that when plaintiffs allege sex discrimination in violation of Title VII, they can make out their *prima facie* case by showing disproportionate impact. So whatever confusion may have arisen from the *Gilbert* decision seems to have been dispelled by *Dothard*. In both race and sex discrimination cases, the "effects" test is applicable and can be used to make out a *prima facie* case for statutory discrimination.

During this past 1982-83 Term, the Court for the first time interpreted pregnancy discrimination prohibition of the 1978 Amendments to Title VII. *Newport News Shipbuilding & Dry Dock Co.* v. *Equal Employment Opportunity Commission*, 51 U.S.L.W. 4837 (June 20, 1983).

The significance of this ruling, however, may be in the implication that the disproportionate impact analysis may not be relevant in this pregnancy discrimination context because the Court indicated in its Newport News opinion that the Title VII proscription applies to both male and female employees who are discriminated against in employment. Specifically, the Supreme Court held in Newport News that company medical plans must cover the pregnancies of employees' wives to the same extent that they cover all other dependents' medical expenses. Failure to provide comparable coverage for dependents' pregnancies constitutes illegal sex discrimination against male employees. Justice Stevens wrote the opinion for the Court and stated that an employer who limits pregnancy coverage for employees' wives "unlawfully gives married male employees a benefit package for their dependents that is less inclusive than the dependency coverage provided to married female employees". Thus, the Court cleared up the confusion over what the Pregnancy Discrimination Act of 1978 meant with respect to dependents' health coverage.

In the Newport News case, a male employee filed a complaint against the company with EEOC. The company had a $500 reimbursement limit for hospital costs related to the pregnancy of an employee's wife, while placing no such limits on hospital care for employees' husbands. The company then filed a pre-emptive lawsuit for an interpretation of the law, and it was successful in the federal district court which held that the 1978 Act protected only pregnant workers themselves. The circuit court of appeals reversed that ruling and gave the statute a more expansive interpretation. The Supreme Court basically upheld the appeals court decision. Writing for the majority, Justice Stevens noted:

> ...Male as well as female employees are protected against discrimination. Thus, if a private employer were to provide complete health insurance coverage for the dependents of its

> female employees, and no coverage at all for the the dependents of its male employees, it would violate Title VII...
>
> By making clear that an employer could not discriminate on the basis of an employee's pregnancy, Congress did not erase the original prohibition against discrimination on the basis of an employee's sex.
>
> In short, Congress' rejection of the premises of *General Electric v. Gilbert* forecloses any claim that an insurance program excluding pregnancy coverage for female beneficiaries and providing complete coverage to similarly situated male beneficiaries does not discriminate on the basis of sex. Petitioner's plan is the mirror image of the plan at issue in *Gilbert*. The pregnancy limitation in this case violates Title VII by discriminating against male employees. 51 U.S.L.W. 4837, at pp. 4840-4841.

What the foregoing discussion seems to indicate regarding the current state of the law is this. In terms of pregnancy discrimination challenges brought under the equal protection clause of the Fourteenth Amendment, there is no legally proscribed sex discrimination absent an intent to discriminate. The *Aiello* decision basically stands for this principle, and it is still valid law. With respect to pregnancy discrimination allegations made pursuant to a statute like the Pregnancy Discrimination Act of 1978, Congress has explicitly provided that this is legally proscribed discrimination in the employment context. Moreover, a case made out under this Act, i.e. Title VII as amended, does not require proof of intent to discriminate. A showing of the disproportionate effects of the discrimination or disproportionate impact will suffice. Even more significantly, however, is the recent Supreme Court decision in *Newport News* which appears to make the impact analysis irrelevant in the sense that the Pregnancy Discrimination Act of 1978 applies to both male and female employees.

DICUSSION OF WHETHER CURRENT ERA PROPOSAL WOULD HAVE AN IMPACT ON ABORTION AND/OR ABORTION FUNDING

The proposed Equal Rights Amendment, as reintroduced in the 98th Congress in H.J. Res. 1 and S.J. Res. 10, provides that--

> Section 1. Equality of rights under
> the law shall not be
> denied or abridged by
> the United States or by
> any State on account
> of sex.
>
> Section 2. The Congress shall have
> the power to enforce,
> by appropriate legislation,
> the provisions of this
> article.
>
> Section 3. This amendment shall take
> effect two years after the
> date of ratification.

This wording of the amendment is identical to that passed by the 92nd Congress in 1972. In 1971, in response to objections from Senator Ervin and several constitutional lawyers, the wording of the enforcement language contained in the second section (which had read since 1943: "Congress and the several States shall have power within their respective jurisdictions, to enforce this article by appropriate legislation") was changed to conform to the enforcement language of most of the other twenty-six constitutional amendments now in effect.

Much uncertainty surrounds the meaning of the proposed language. Clarification depends, of course, to a great extent on the legislative history the 98th Congress develops through the course of the hearings held, reports issued, and floor debates. While an extensive legislative record exists with respect to the 92nd Congress proposal, H.J. Res. 208, that history is only instructive and not controlling with respect to the current measure because the actions of one Congress do not bind a future Congress. Therefore, it is up to the 98th Congress to develop its own legislative history for H.J. Res. 1 and S.J. Res. 10.

In addition to looking to the legislative history to determine what the proposed ERA means, guidance may be found in contemporaneous court decisions, the rationales used, and the standard of review applied to sex-based classifications under the equal protection clause of the Fourteenth Amendment.

Earlier Congresses have found little disagreement with the general intent of the proposed amendment. A Senate Judiciary Committee report in 1972 (S. Rep. No. 92-689, 92d Congress, 2d Sess.) interpreted the statement "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex" to mean that sex should not be a factor in determining the legal rights of men and women; that the Amendment would affect only governmental action, with the private actions and private relationships of men and women left unaffected unless these rise to the level of state action; and that the only requirement of the Amendment was equal treatment of individuals. The proposed Amendment also gives Congress power to enforce these provisions (the States already possess such authority under their general police power) and provides that the Amendment shall take effect two years after the date of ratification, i.e. after three-fourths or 38 states have approved the proposal. The two year period is provided presumably for the purpose of giving state legislatures and the Congress time to amend their laws to bring them in conformity with the intent of the proposed ERA.

The effect of the ERA, according to the 1972 Senate Report, would be to require that government at all levels, federal, state and local, treat men and women equally as citizens and individuals under the law. It would eliminate from the law sex-based classifications that specifically deny equality of rights or violate the principle of nondiscrimination with regard to sex. Thus, federal or state laws or official practices that now make a discriminatory distinction between women and men would be invalid under the ERA, and certain responsibilities and protections which once were, or are now, extended only to members of one sex would have to be either extended to both sexes or eliminated entirely.

While the equal protection language in the Fourteenth Amendment is not identical to the "equality of rights" language in the proposed ERA, the Supreme Court's Fourteenth Amendment decisions thus far in the gender-based discrimination context are instructive in terms of the standard of review analysis used by the Court to determine which classifications are illegal. Of course, Congress can express in the legislative history what type of standard it intends the Court to apply under the ERA, if it wants a more or less stringent level of review applied to sex-based classifications than that currently utilized under the equal protection clause. As we discussed earlier in this paper, there are basically three standards of review: traditional, rational basis; intermediate (one less deferential than the rational basis test and one less strict or less fatal than the strict scrutiny test); suspect class-fundamental interest or strict scrutiny test. The intermediate standard has been used by the Supreme Court in sex discrimination cases. Sex classifications, therefore, must, in order to withstand constitutional challenge, "serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). *Mississippi University for Women v. Hogan*, 102 S. Ct. 3331, 3337 (1982).

In making a determination of the impact of the ERA on abortion, abortion funding, and other pregnancy related issues, one would have to decide whether a pregnancy classification would be a sex-based classification under the ERA. As we have already discussed in this report, it has not been regarded to be such under the equal protection clause of the Fourteenth Amendment as the Supreme Court held in *Aiello*. Congress could in processing an ERA proposal set forth in the text or in the legislative history whether pregnancy classifications are to be considered sex-based classifications. If Congress did not so indicate, the Supreme Court would ultimately decide whether *Aiello*'s holding would apply in the ERA context.

Whether the proposed ERA would have an impact on abortion and/or abortion funding turns largely upon the outcome of one or the other modes of analysis. (1) If pregnancy classification are sex classifications, what standard of review —strict scrutiny, intermediate, or rational basis—applies to such classifications. (2) If pregnancy classifications are not sex-based classifications under the ERA, whether an intent or an effects test governs the review of what would be, in the context of a bar on sex discrimination, statutory classifications that are facially neutral.

With respect to the first issue of standard of review, if strict scrutiny, the most active form of judicial review, is the standard applied, then the answer to the question whether pregnancy classifications are sex-based classifications would seem to be affirmative. It would then follow that the ERA would reach abortion and abortion funding situations. It is very difficult for the government to meet the burden of showing that the classification in question serves a compelling state interest, thus, classifications subjected to active review are almost always invalidated as being violative of the Constitution.

Under an intermediate standard of review, the answer to the question whether pregnancy classifications are sex-based classifications and as such impermissible under the Constitution is not as clear-cut. In order for the classification to withstand constitutional challenge, the burden is on the government to show that the classification serves "important governmental objectives" and is "substantially related to the achievement of those objectives." *Craig v. Boren*, *supra*, and *Mississippi University for Women v. Hogan*, *supra*. It is somewhat easier for the government to meet this standard than it is for it to meet the strict scrutiny standard requiring proof of a compelling state interest. Nevertheless, the intermediate standard of review is stronger than the rational basis test, and pregnancy classifications have a greater chance of being invalidated under it than the traditional standard if it is the standard applied under the ERA.

The classifications evaluated under the traditional, rational basis standard almost invariably withstand constitutional challenge. The burden on the government is less weighty, and it only has to show that the classification is rationally related to the governmental objective. Thus, should this traditional standard of review be the one applied under the ERA, it is unlikely that the ERA would affect abortion or abortion funding. In *Geduldig v. Aiello*, *supra*, the Court applied what most closely resembles this less stringent standard of review. To date, *Aiello* is the only Supreme Court precedent under the equal protection clause with respect to a regulation concerning pregnancy, and the Court held therein that a pregnancy classification was not a sex-based classification absent proof of a pretext or intent to discriminate.

This brings us to the point of examining the second issue — the significance of applying a motive or impact analysis under the ERA. If one answers the question whether pregnancy classifications are sex-based classifications in the negative, then one must next ask if proof of motive controls. Under *Aiello*, proof of motive would be essential. *Aiello* was decided on Fourteenth Amendment equal protection grounds where proof of a discriminatory animus is essential to making out a case of unlawful discrimination. With respect to the proposed ERA, one would have to look to the legislative history to see what Congress' intentions were. If it is discernible that Congress wanted an intent test to apply under the ERA, then proof of intentional discrimination must be established before a court would invalidate the pregnancy classification on constitutional grounds.

If one answers the question whether pregnancy classifications are sexbased classifications in the negative, there is also the option of applying an impact or "effects" analysis in lieu of the motive or intent test. Should an impact analysis control under the proposed ERA and the impact of the classification is on women only, then the ERA would affect abortion and abortion funding. Only women can become pregnant and, in that sense, pregnancy classifications are sex-based classifications. However, the recent Supreme Court decision in *Newport News*, *supra*, indicates that there can be a situation where a pregnancy classification affects both females and males alike. In *Newport News*, *supra*, the Court found that the Pregnancy Discrimination Act of 1978 applied to both female and male employees. The employer's action of not providing disability benefits for the spouses of male workers while simultaneously extending benefits to the dependents of female workers violated the 1978 Act which is part of Title VII. Thus, in a statutory context, the Court interpreted a classification based on pregnancy to be unlawful sex discrimination against males. It arrived at this conclusion in part by examining the legislative history to ascertain the congressional intent. The interesting aspect of the Newport News decision, therefore, is that it reveals that there can be instances where a pregnancy classification affects both women and men in a sex-based sense, and if such is the case under a statute like Title VII, a similar result could conceivably occur in the constitutional context. If the latter is the case, then the impact analysis would be irrelevant, and the ERA may not reach abortion and/or its public funding.

In the abortion funding context, it was earlier noted how some ERA proponents in certain state ERA cases have argued in complaints and briefs filed before state courts that to deny public funds for abortion constitutes sex discrimination because only women can become pregnant and to single them out to deny them funds for this purpose violates the state ERAs in question. This position may or may not have a credible basis depending upon whether courts view pregnancy discrimination as legally proscribed sex discrimination under the ERA. Thus far, no state courts have ruled on the merits of the issue. Moreover, to date, the Supreme Court has treated the substantive abortion right separately from the funding question.

As also discussed earlier, the Supreme Court made it clear in its McRae decision that the federal government had no affirmative obligation to ensure that everyone have the financial resources to obtain an abortion, or for that matter to even obtain contraceptives. 448 U.S. 297, at 317-318. It was deemed by the Court to be a legislative decision whether to subsidize abortions for indigent women, and in deciding through statutory enactment or regulation not to do so, the legislature would *not* be violating the Due Process Clause of the Constitution. Poor women could still obtain abortions elsewhere and could do so with private funds. In short, the unavailability of public assistance to get an abortion did *not* impinge on the right in any way. The decision to fund or not to fund or to allocate money in specified amounts for a particular purpose is a separate matter from that of regulating abortion in a substantive legislative content. This is apparent because even in the face of *Roe v. Wade* constitutionally protecting a woman's right to an abortion, Congress still had authority to restrict federal money for it, e.g. the Hyde Amendments. The way a court evaluates the constitutionality of public funding restrictions regarding abortion is different from the manner in which it reviews a situation where the abortion right itself is directly impinged upon.[9/]

In February, 1973, for example, in Minnesota City, Virginia, the city's Hospital Commission tried to proscribe by resolution the use of the city's hospital facilities for all abortions except those "required to save the life of the mother." Doctors and staff members at the hospital sought relief in court alleging infringement of their constitutional rights. The court at the time held that the resolution was constitutionally invalid and entered an injunction requiring that the hospital facilities be made available to duly licensed physicians to perform abortions within the rules established by the Supreme Court in *Roe v. Wade* in 1973. Then in August, 1980, after the Supreme Court's public funding decision, the City of Virginia filed a motion to vacate the injunction on the theory that the law had changed since *Roe v. Wade* and therefore, the prospective application

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[9/] See David T. Hardy, Harris v. McRae: Clash of a Nonenumerated Right with Legislative Control of the Purse, 31 Case Western Reserve Law Review 465 (Spring 1981). Here the author examines the question of whether the government has a duty to finance abortions for indigents. He reviews the history of the abortion right, the right of privacy, and legislative preeminence public funding.

of the injunction was no longer equitable. The city was, of course, relying on the Supreme Court's decisions in *Maher*, *Poelker*, *McRae*, and *Zbaraz* which it viewed as altering abortion law from that established earlier and initially in *Roe v. Wade*.

On November 11, 1981, the U.S. Court of Appeals for the Eighth Circuit ruled that the U.S Supreme Court decisions upholding abortion funding restrictions were not controlling in the case before it because use of public money was not involved, and therefore, a city's ban on abortions in a municipal hospital was unconstitutional. The Eighth Circuit found that the City of Virginia's attempt to eliminate access to abortion services at its hospital ran afoul of *Roe v. Wade*. *Nyberg v. City of Virginia*, 50 U.S.L.W. 2440 (February 2, 1982).

In *City of Virginia*, the Eight Circuit emphasized that there was a crucial distinction between the Supreme Court's public funding of abortion holdings and its *Roe v. Wade* determination noting the existence of a right to abortion as a fundamental right emanating from the constitutional right of privacy. In highlighting the distinction, the Eighth Circuit explained:

> These cases [involving public funding restrictions] held that the constitutional freedom of a woman to decide whether to terminate her pregnancy did not prevent the state from making a value judgment favoring childbirth over abortion, and implementing that judgment by the allocation of public funds. Under the resolution at issue here, however, the city and the Hospital Commission attempt to do more than simply deny governmental funding for abortions. If the resolution is effective, then no woman could obtain an abortion in the city hospital unless her life were endangered. Thus, the city attempts to eliminate access to abortion services at the sole hospital in the city...
>
> The facts in this case differ significantly from the recent Supreme Court decisions. The city and the Hospital Commission are not required to provide free abortions, hire doctors who will do abortions, or subsidize the abortion services. The injunction requires the city simply to allow staff physicians

> to perform paid abortions at the hospital. In *Maher*, *Harris*, and *Williams*, direct public expenditure was at issue. In *Poelker*, the Court determined that a city hospital was not required to spend public funds to hire doctors who would perform abortions or otherwise provide publicly financed hospital services for indigent women.
>
> There is a fundamental difference between providing direct funding to effect the abortion decision and allowing staff physicians to perform abortions at an existing publicly owned hospital. The strict scrutiny analysis required by *Roe v. Wade* and its progeny is still controlling. 50 U.S.L.W. 2440-2441.

The Supreme Court recently denied *certiorari* in the case. 51 U.S.L.W. 3901 (June 20, 1983). Therefore, the Eighth Circuit decision is final.

In the portion of this report discussing the arguments concerning whether the ERA would have an impact on abortion and/or its funding, attention was drawn to the point made by Walter Berns in his testimony before the Senate Judiciary Subcommittee on the Constitution concerning the husband's interest in abortion. In a footnote, Berns referred to *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) and noted that the Court had observed in that case that a husband may have a "deep and proper concern and interest" in his wife's pregnancy. At the time the Court decided *Danforth*, it stated that in the event of a conflict the husband's interest had to give way to a wife's right to have an abortion. Berns argued in his statement to the Subcommittee that if the ERA were approved it would alter the situation by converting the husband's interest into a right, a right equal to the wife's. There may be some credibility in this argument given the Supreme Court's decisions regarding child adoption situations and parents' interest and rights therein. *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson* 51 U.S.L.W. 5010, (June 27, 1983).

In *Caban v. Mohammed*, *supra*, the unwed father challenged the constitutionality of a section of the New York Domestic Relations Law under which two of his natural children were adopted by their natural mother and stepfather without his consent. The Supreme Court held the statute to be unconstitutional on the ground that "the distinction it invariably makes between the rights of unmarried mothers and the rights of unmarried fathers has not been shown to be substantially related to an important state interest." 441 U.S. 380, 382 (1979). The Court found that the New York law treated unmarried parents differently according to their sex and thus violated the equal protection clause of the Fourteenth Amendment. The Court emphasized that the facts in *Caban* showed that an unwed father could have a relationship with his children fully comparable to that of the mother. The Court wrote:

> We find that the distinction in § 111 between unmarried mothers and unmarried fathers, as illustrated by this case, does not bear a substantial relation to the State's interest in providing adoptive homes for its illegitimate children. It may be that, given the opportunity, some unwed fathers would prevent the adoption of their illegitimate children. This impediment to adoption usually is the result of a natural parental interest shared by both genders alike; it is not a manifestation of any profound difference between the affection and concern of mothers and fathers for their children.
> *Id.* at 391-392.

Caban is significant in terms of the recognition the Supreme Court accorded the interest of an unwed father whose identity was known and who manifested a significant paternal interest in the child. The Court emphasized that the facts in *Caban* illustrate the "harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children." *Id.* at 394. The Court pointed out further that the New York law in question on the one hand excluded some loving fathers from full participation in deciding whether their children should be adopted, while on the other hand, made it possible for some alienated mothers "arbitrarily to cut off the paternal rights of fathers." *Id.*

Most recently, the Supreme Court decided *Lehr v. Robertson*, 51 U.S.L.W. 5010 (June 27, 1983) in which it distinguished its earlier *Caban* decision. The question in *Lehr* was whether New York had sufficiently protected an unmarried father's inchoate relationship with a child whom he had never supported and rarely seen in the two years since her birth. The father challenged the New York law arguing that both the due process and equal protection clauses of the Fourteenth Amendment gave him an absolute right to notice and an opportunity to be heard before the child could be adopted. The Supreme Court disagreed and held that the father's rights had not been violated given the facts of the situation. Here the unwed father had not demonstrated a full commitment to the responsibilities of parenthood. The Court stressed that "...the mere existence of a biological link does not merit equivalent constitutional protection." *Id*. at 5014. The Court did not get involved in assessing the constitutional adequacies of New York's procedures for terminating a developed relationship. Instead, it was concerned only with whether New York had sufficiently protected his opportunity to form such a relationship. It held that the New York law did do so, and there was no denial of due process.

With respect to the equal protection claim, the Court found that the unwed father's rights were not violated: "Because...appellant has never established a substantial relationship with his daughter...the New York statutes at issue in this case did not operate to deny appellant equal protection." *Id*. at 5016. *Lehr* was distinguished from *Caban* on the grounds that here in *Lehr* the mother and father were not similarly situated. In *Caban*, the father had admitted paternity and had participated in the rearing of the children, and therefore, the equal protection clause protected him by giving him the same veto right concerning adoption as that employed by the unwed mother. The Supreme Court concluded in Lehr that,

> ...If one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights.
> Id.

These two adoption cases may be important for the argument that Walter Berns was trying to make in the context of the ERA and abortion in his statement to the Senate Judiciary Subcomittee on the Constitution on May 26, 1983.

Opponents of the ERA and of abortion have argued that the ERA would not only expand the substantive right to an abortion, but would also mandate the public funding of abortion. In essence, they see the ERA as providing a basis for the Supreme Court to overrule its funding decisions. It is difficult at this stage to ascertain whether that would in fact result. There are no state court decisions on this question in states with state ERAs similar in language to the federal proposal. Also, it is unclear what standard of review courts would apply in reviewing gender-based classifications. This is especially true at this time because a fully developed legislative history for H.J. Res. 1 and S.J. Res. 10 has yet to be established.

CONCLUSION

The impact of the ERA on abortion and abortion funding would depend to some extent on the legislative history established by Congress. It would also turn on how the Supreme Court answers the question whether a pregnancy classification constitutes a legally prohibited sex-based classification. Clearly, pregnancy discrimination is sexually related, but the crucial issue is whether it is a prohibited practice in the legal sense. Determination of the impact of the ERA on abortion and its public funding revolves around how the Supreme Court would handle two issues: (1) the standard of review applicable under the ERA — strict scrutiny, intermediate, or rational basis and (2) the application of an intent or impact analysis, given a situation where the classification is facially neutral.

Theories and arguments have been expressed on both sides of the question whether the ERA would affect a woman's right to an abortion and/or the access to public funding to pay for it. However, as of the writing of this paper, there have been no state court decisions in states with state ERAs delineating the extent, if any, that the state ERA in question affects abortion and/or abortion funding.

Karen J. Lewis

Karen J. Lewis
Legislative Attorney
American Law Division
October 20, 1983

RUTGERS
THE STATE UNIVERSITY
OF NEW JERSEY

SCHOOL OF LAW-CAMDEN • FIFTH AND PENN STREETS • CAMDEN • NEW JERSEY 08102

November 7, 1983

The Honorable Don Edwards
Chairman, Subcommittee on Civil and Constitutional Rights of the
House Judiciary Committee
806 House Annex #1
Washington, D.C. 20515

Dear Representative Edwards:

At the close of my testimony before your subcommittee on November 3, 1983, I was asked a question about a document prepared by the Congressional Research Service entitled "A Legal Analysis of the Impact of the Proposed Equal Rights Amendment on the Right to an Abortion or to the Funding of an Abortion"(October 20, 1983). I wish to supplement my oral testimony with a more complete explanation of my opinion about this document.

As I stated at the hearing, the CRS analysis is poorly written, poorly reasoned and erroneous. First, the CRS report fails to understand the basic legal theory of the ERA as consistently articulated by the relevant congressional committees and major academic commentators. Second, the CRS report erroneously relies on the Supreme Court's current sex discrimination doctrine as a basis for interpreting the ERA. Third, the CRS report fails to analyze the major Supreme Court cases on abortion funding that are most relevant to its own topic. As a result, the CRS report concludes that the ERA is likely to require public funding of abortions when in fact, the ERA will have no practical effect on existing Supreme Court decisions permitting Congress not to provide public funding for abortions.

The CRS analysis incorporates incorrect legal understandings about explicit sex classifications, classifications based on unique physical characteristics and neutral rules with a disparate impact on one sex and that are associated with or perpetuate characteristic patterns of sex discrimination. The correct approach to these types of classifications has been laid out repeatedly. See for example the 1972 Senate Judiciary Committee Report on the ERA, the House Judiciary Committee Report, the 1971 Yale Law Journal article which I co-authored with Professor Emerson, Barbara Brown and Gail Falk, and Professor Emerson's and my testimony at the November 3 hearings. CRS' lack of understanding of the basic legal framework of the ERA is responsible for numerous errors, including for example the misleading CRS discussion of prior statements concerning abortion funding and the ERA made in 1976 and 1978 by Professor Emerson (CRS 4-8) (statements which are in fact wholly consistent with Professor Emerson's and my testimony at the November 3 hearing and our prior statements concerning the ERA.)

The CRS' attempts to derive principles for ERA interpretation from a detailed analysis of Supreme Court sex discrimination decisions made pursuant to the equal protection clause are similarly misguided. The ERA is being proposed precisely because of defects in the Supreme Court's sex discrimination jurisprudence to date. Yet the CRS consistently confuses doctrines and concepts characteristic of sex discrimination law under the equal protection clause with those of the ERA, for example by discussing rationality review and intermediate scrutiny as possible standards for ERA-based review of explicit sex classifications and by basing what purports to be equal rights amendment analysis of classifications based on unique physical characteristics on equal protection clause decisions.

Finally, although the CRS document spends many pages reviewing Supreme Court decisions based on the constitutional right to privacy (CRS 20 - 41), it presents virtually no analysis of Harris v. McRae, 448 U.S. 297 (1980) and the three Zbaraz cases, ~~448 U.S. 297 (1980)~~, ~~the~~ Supreme Court decisions which focus specifically on the constitutionality of federal and state restrictions on the funding of therapeutic abortions (CRS 41-42). Since the practical effect of the ERA on future decisions of the Court in this area depends so significantly on an understanding of the approach taken by the Court when dealing with this subject in the past, this omission is rather surprising. The CRS also notes, but does not emphasize, the fact that the state courts which have thus far considered ERA-based sex discrimination arguments about abortion funding have all decided on other grounds.

Professor Emerson and I, as well as other witnesses before the committee, have repeatedly emphasized the importance of Harris and Zbaraz as cases for our opinions about the impact of the ERA on abortion funding. Despite repeated efforts by abortion funding advocates to obtain favorable rulings based on sex discrimination arguments under the equal protection clause, the Supreme Court has remained committed to a privacy-based analysis. In Craig v. Boren, 429 U.S. 190 (1976), the Supreme Court ruled that a sex classification will be invalidated under the equal protection clause of the fourteenth amendment unless the government can show that the challenged classification is substantially related to an important government interest. Had the Supreme Court viewed the abortion funding issue as raising an important issue of sex discrimination, the Court would have addressed explicitly the question of whether the Hyde amendment was substantially related to an important government interest. Instead, the Supreme Court decided the case entirely on privacy grounds and dismissed the sex discrimination argument in one sentence. (The equal protection issue of discrimination based on wealth was also summarily dismissed.) Similarly, sex discrimination arguments based on state ERAs have on several occasions been made in state courts. However, no state court has relied on a state era in an abortion funding case. Yet state ERAs and the other state constitutional provisions that were argued in these cases have equal legal status as authorities for state court decision. Thus, the failure of state courts to rely on their state ERAs tends to support the contention of ERA proponents that the privacy analysis will for the foreseeable future continue to dominate judicial approaches to the subject of abortion and abortion funding. It is my considered opinion that the constitutional right to privacy will remain for the foreeseeable future, as it is now, the dominant mode of analysis for claims concerning abortion and abortion funding and that if the Supreme Court were to reverse itself, the constitutional right to privacy would be the vehicle the Court would choose. Therefore, far from compelling the government to provide public funding for abortions, the ERA will have no practical effect on the Supreme Court's decisions in this area.

Sincerely,

Ann S. Freedman

Ann E. Freedman
Associate Professor of Law

Lynn D. Wardle
1976 N. 85 W.
Orem, UT 84057

16 January 1983

Honorable Orrin Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

In recent weeks I have read in several publications that certain lawyers, law professors, and political officials have expressed their opinion that the Equal Rights Amendment, as presently worded, has nothing to do with abortion. Several of them have suggested that if the ERA were enacted it would have no effect upon the legality or funding of abortion.

As you know, I am a Professor of Law at Brigham Young University and I have devoted considerable time to studying and writing about constitutional issues relating to abortion. The potential impact of the ERA on abortion is a subject of great professional and personal interest to me. For that reason, I am writing this letter to you to express my personal opinion about what impact passage of the ERA, as presently worded, would have on the constitutional issues of abortion restriction and funding.

In my opinion, passage of the ERA unquestionably could set in constitutional concrete the judicially-created doctrine of abortion-on-demand and could result in mandatory public funding for nontherapeutic abortions. While I do not believe that it would be necessary or desirable to interpret the ERA in that manner, yet if the ERA is passed in its present form those are predictable consequences.

Offhand, I can think of three separate lines of argument by which the ERA, in its present form, could be construed by the courts in a radically ppro-abortion manner.

First, any restrictions on abortion or abortion funding could be held to violate the ERA as unlawful discrimination against women. Obviously restrictions on abortion and abortion funding impact more directly upon women than men since only women can become pregnant. And while discrimination on the basis of pregnancy has been held not to violate the Fourteenth Amendment, we must remember that the purpose of the ERA is to outlaw much of the sex-impacting discrimination that is allowed under the Fourteenth Amendment (i.e., it is because the Fourteenth Amendment does not go far enough to prohibit certain types of discrimination that impact upon one sex that the ERA is being pushed). Thus, it would not be unexpected for the Supreme Court to hold that pregnancy-related restrictions violate the ERA. And since several members of the Court have already expressed the opinion that abortion is just another method of "treating" pregnancy, it would seem logical for the Court to hold that laws discriminating against any particular method of "treating" a pregnancy (i.e., abortion restrictions or abortion funding restrictions) impermissibly discriminate against women and violate the ERA.

Second, passage of the ERA while the doctrine of abortion-on-demand established in *Roe v. Wade* and its progeny is in full flower could be seen as evidence of the intent to legitimate and crystalize through an express constitutional amendment the abortion decisions. When the ERA was proposed by Congress the first time, the Supreme had not yet decided *Roe* or declared its radical abortion doctrine. Abortion was still prohibited or restricted in all 50 states and the District of Columbia. But now, the legal landscape has changed dramatically. The Supreme Court has ruled practically all abortion restrictions unconstitutional. We have been told that the Constitution implicitly guarantees the right to abortion-on-demand as created in Roe, the right of married women to obtain abortions without spousal consent as declared in Planned Parenthood v. Danforth, the right of minors to get abortions without parental consent as established in Planned Parenthood and Bellotti, the right of abortionists to perform abortions without disclosing the facts of fetal development as declared in Akron, etc. In view of present status quo in abortion law, it would extremely dangerous to pass the ERA without some clear, authoritative, congressional repudiation of the abortion decisions. In the absence of any explicit negation of the current abortion doctrine, it would be easy for the Court to hold that the right of abortion privacy, in all of its excessive and repugnant manifestations, has been tacitly incorporated within the ERA, and that attempts to restrict or regulate abortion violate the ERA.

Finally, the obvious susceptivity of the ERA to pro-abortion interpretations has been raised in hearings held in both houses of congress by serious constitutional scholars, respected legal experts, and knowledgeable members of congress. It is undeniable that congress is aware that the ERA in its present form could be interpreted in a definitely pro-abortion manner. Many of the most prominent and vocal supporters of the ERA, both in and out of congress, are outspoken advocates of "reproductive freedom," i.e., abortion-on-demand and publicly funded abortion. Thus, passage of the ERA in its present form, without any clear and explicity congressional action to prevent a pro-abortion interpretation, would signify at least a lack of congressional intent that the ERA not be interpreted to set in concrete the right to abortion-on-demand, and could be seen as evidence of a tacit congressional intent that the ERA should be so interpreted.

In light of these three separate grounds for interpreting the ERA so as to secure the right to abortion-on-demand and even abortion funding, I believe that it is irresponsible for anyone to give assurances that the ERA could not be given a strongly pro-abortion interpretation. Remember, if it is passed and ratified, the ERA will be interpreted by the same department (the Supreme Court) which was able to interpret the Constitution so as to give us Roe v. Wade, Planned Parenthood v. Danforth, Colautti v. Franklin, Akron, etc., even without an amendment written and promoted by the advocates of greater abortion rights.

Those who oppose congressional action to clarify this matter by arguing that the ERA has nothing to do with abortion are irresponsible in another way as well. We must not forget that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." Missouri K. & T. R. Co. v. May, 194 U.S. 267,270 (1904)(Harlan, J.). Indeed, the task of amending the Constitution is specifically and exclusively vested by the Constitution in the legislative (or convention) branches of the federal and state governments--not the judicial branch or the legislative branch. It is a nondelegable constitutional responsibility. For members of congress to refuse to address serious questions about the meaning and intent of a proposed Amendment to the Constitution, to merely shrug their shoulders as if to say "we'll let the courts worry about that," is a serious breach of trust. For a member of congress to pass the buck to the courts in this instance would not only be a crude political act but would constitute deserting a constitutional post in a time of crisis.

Regardless of how one feels about the proposed ERA or about the doctrine of abortion-on-demand, it would seem incumbant upon all persons of good faith to insist that congress honestly perform its constitutional obligation to the people of this country and squarely address this hard question. This could be done by adding brief clarify language to the test of the proposed ERA, by adding clarifying language to the enabling act or the Resolution embodying the ERA, or even by including an explicit, unequivocal statement in a relevant committee report, especially if that language were brought to the attention of all members of congress in such a fashion as to elicit their clear assent when they vote for the ERA.

Finally, it is worth noting that for nearly a century the Utah Constitution has given women full political and legal equality. Article IV,§1 of our state Constitution reads:

> The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges.

Note that on its face this provision of the Utah Constitution appears to be as open-ended and unrestricted as the ERA. Why, then, do many people in Utah have such a mistrust of the ERA?

I believe that the answer that question has to do with the fact that Utah's commitment to equal rights arises from its belief in the equal worth under law of all human beings--a value which not only makes sex discrimination unacceptable but which makes abortion an abhorent practice. Moreover, the failure of the supporters of the ERA to accept reasonable proposed constructions or clarifications of the proposed amendment, such as the Sensenbrenner proposal, and their refusal to repudiate radical interpretations does not inspire confidence in reasonable men and women. The Utah equal rights provision was enacted at a time and in a context that launched it on a course of reasonable and careful application. The Utah state courts, likewise, have been faithful to their role as interpreters and have given it a reasonable construction. By way of contrast, the radicalism of many ERA supporters and the unrestrained judicial activism of the federal courts, especially pertaining to abortion, threaten fundamental values and institutions that Utahns hold sacred.

Thus, I hope that you will do all you can to insist that the ERA is officially and explicitly clarified by Congress when it comes up for consideration. For regardless of one's opinion about advisability of the ERA or its potential effect on abortion and other important legal issues, the only responsible course is for congress to squarely and directly face those issues before voting on the ERA.

Very truly yours,

Lynn D. Wardle

Lynn D. Wardle

copy:
Hon. Orrin Hatch
Hon. Howard Nielson
NRLC
AUL

UNIVERSITY OF CALIFORNIA, BERKELEY

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SCHOOL OF LAW (BOALT HALL)
BERKELEY, CALIFORNIA 94720
TELEPHONE (415) 642-

February 2, 1984

Honorable Orrin G. Hatch
United States Senator
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Hatch:

I am a Professor of Law at the University of California, Berkeley, and have been since 1967. I specialize in Constitutional Law, although not in the areas of either sex discrimination or abortion.

I have been asked to express my opinion on whether the proposed ERA would be construed to invalidate abortion funding restrictions. In my opinion there is a strong possibility that it would do so.

Already under the Equal Protection Clause, proponents of abortion rights have argued that abortion funding restrictions discriminate against groups specially-protected by the Constitution. This argument was adopted by the District Court and by at least one Justice of the Supreme Court in Harris v. McCrae.

As presently worded, the ERA would strengthen the argument that restrictions on abortion funding violate the constitutional requirement of equality, inasmuch as they disadvantage only women. I understand that this argument is already being made by proponents of abortion rights under the state ERAs.

Undoubtedly, even if the present ERA is adopted, opponents of abortion rights would have grounds to argue that abortion funding restrictions have not been affected. There are theories of the ERA and pieces of legislative history that support their position. Given the complexity of the legal materials, none of these arguments would be conclusive.

I understand that opponents of abortion rights have asked that the ERA be amended to disclaim an effect on abortion laws. If this amendment is rejected, the action will further strengthen the argument that the ERA invalidates abortion funding restrictions.

The present Supreme Court is split 5-4 on the constitutionality of the restrictions; the membership of the Court is apt to change soon; and many lower federal judges are firm proponents of abortion rights. There is a strong possibility that the proposed ERA would tip the scales.

I hope that these observations may be of help to your committee.

Sincerely,

Michael E. Smith

Michael E. Smith
Professor of Law

MES:ss

AMERICANS
UNITED FOR LIFE
Legal Defense Fund

230 N. Michigan, Suite 915
Chicago, Illinois 60601
312.263-5029

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Harvard University

Jasper F. Williams, Sr., M.D.
Obstetrics - Gynecology

January 5, 1984

Doug Johnson
National Right to Life Committee
419 7th St. NW #402
Washington DC 20004

Dear Mr. Johnson:

You have asked that we respond to the correspondence directed to Representative Don Edwards by Ann Freedman, Associate Professor of Law at Rutgers School of Law, denying that the proposed Equal Rights Amendment (ERA) could in any way compel the government to fund abortion.

Prof. Freedman argues that the Supreme Court has consistently upheld abortion funding restrictions based entirely on "privacy-based analysis" and has refused to examine such restrictions under equal protection analysis. She then asserts that the Court would employ the same form of analysis in the wake of the ERA and that the ERA would therefore not affect abortion funding restrictions. Prof. Freedman also cites the failures of state courts so far to nullify abortion funding restrictions in light of state ERA provisions as authorities in favor of her position.

It is simply not the case that the abortion funding decisions of the U.S. Supreme Court have been exclusively based on the Court's analysis of the due process right to privacy. To the contrary, Maher v. Roe, 432 U.S. 464 (1977), Harris v. McRae, 448 U.S. 297 (1980), and Williams v. Zbaraz, 448 U.S. 358 (1980), the principal Supreme Court abortion funding cases, were far more concerned with equal protection analysis than with the right to privacy, as even a casual reader would observe.

Although it is true that the U.S. Supreme Court has so far avoided any claim that such restrictions involve unconstitutional sex-discrimination, this has occurred in the context of a state of law in which gender-based discrimination is not subject to strict judicial scrutiny, gender is not regarded as a suspect class for equal protection purposes, and in which discrimination based on gender-specific procedures or conditions (such as abortion and pregnancy) is not regarded as inherently suspect. Enactment of the ERA would radically alter this state of law by making all gender-based discrimination subject to the most exacting constitutional scrutiny.

Finally, the failure of state courts to rely on state ERA provisions when striking down state abortion funding restrictions proves only that these state courts had independent bases to strike such restrictions and, hence, were not required to reach the ERA claims. These decisions represent no authority whatever for Prof. Freedman's proposition.

Americans United for Life Legal Defense Fund has taken the position that the proposed ERA is facially neutral with respect to abortion funding restrictions. However, statements of ERA proponents and claims made under state ERA provisions by abortion advocates make it obvious that the proposed ERA will be used as yet another tool to strike down abortion regulations and funding restrictions. We have consistently asserted that an ironclad, unambiguous legislative history or explicit language appended to the proposed ERA is necessary to foreclose the possibility that the ERA would affect abortion funding restrictions. Since the proponents of ERA have refused either to provide such explicit legislative history or to permit any amendment to the ERA, we must logically conclude that they wish to keep open the possibility that the courts will employ the ERA to further expand permissive abortion, or to strike down abortion funding restrictions.

Sincerely,

Paige Comstock Cunningham

Paige Comstock Cunningham
Executive Director-General Counsel

Thomas J. Marzen

Thomas J. Marzen
Chief Staff Counsel

PCC/TJM:VR

School of Law
University of Texas
727 East 26th Street
Austin, Texas 78705

December 7, 1983

Douglas Johnson
Legislative Director
National Right to Life Committee
419 7th Street, N.W.
Suite 402
Washington, DC 20004

Dear Mr. Johnson:

This is to register my strong disagreement with a letter from Professor Ann E. Freedman of Rutgers University stating that the Equal Rights Amendment (ERA) "will have no practical effect on the Supreme Court's decisions" in the area of abortion funding.

Prof. Freedman seems to be saying that since the Court can always use the right-to-privacy rationale to reverse itself on abortion funding, the equal protection rationale that might be afforded by the ERA would be superfluous and therefore somehow irrelevant. The fact remains, however, that the Court in *Harris v. McRae* (1980) decided that governments' failure to pay for abortions violated *neither* the Equal Protection Clause *nor* the "right to privacy." If a government action violates *any* constitutional provision it is, of course, unconstitutional. If the Court should hold that the ERA makes sex a "suspect classification"--and that governments are therefore forbidden to discriminate against sex-specific medical procedures such as abortion--it will matter not at all that the Court could have reached the same result via the right to privacy.

Finally, Prof. Freedman seems to disagree with most other prominent ERA supporters when she suggests that the Court's holdings under the Equal Protection Clause are not a useful starting point for analyzing the possible effects of the ERA. Most analyses I've seen suggest that the ERA would make sex *at least* a "suspect classification." In any case, the question for me is not whether the Court would be *bound* to declare a constitutional right to abortion funding, but whether the ERA would give rise to a substantial *possibility* that the Court would find such a right. In my view, the Court's own prior holdings in a closely related area are a useful source of hints about the answer to this question. These holdings, and much of what has been said and written about the ERA by its academic and political supporters, clearly suggest a strong possibility that the ERA would result in the striking down of laws that finance most medical procedures but exclude abortions.

Sincerely,

Grover Rees III

Grover Rees III
Assistant Professor

GR/os

FLORIAN C. CHMIELEWSKI
Senator 14th District
Sturgeon Lake, Minnesota 55783
Home (218) 372-3616
Office:
125 State Capitol
St. Paul, MN 55155
(612) 296-4182

Senate
State of Minnesota

January 10, 1983

Mr. Doug Johnson
National Right-To-Life Committee
419 7th Street N.W.
Washington, D. C. 20004

Dear Mr. Johnson:

Re: ERA/Abortion bill

On February 22, 1983, we wrote to Mr. Paul Freund of the Harvard Law School asking for the affects of another ERA bill. Mr. Freund responded by phone to our office on February 28, 1983, of which I am quoting below:

"Actually it seems they differ only in emphasis, they agree that up to now, no State ERA has affected the abortion or homosexual issues. However, Jordan's opinion emphasizes the possibility that such affects could be felt in the state and I tend to agree with him. In particular, I agree that it could have an effect on abortion funding by the state as reinforcing an equal protection agreement.

However, my basic reaction is that at this stage in formulating the amendment, a Legislature has an opportunity, if not indeed a responsibility, to clarify these issues. This could be done either by an authoratative report or by including a provision in the text itself. If the will of the Legislature is is that the amendment should have no affect in enlarging or abridging rights with respect to abortion or homosexuality relations, this could be readily stated. My feeling is that some proponents of the amendment might like to use it in these fields and before it is submitted to the people and other courts, I think the Legislature should clarify its meaning in this respect."

After receiving the above statement by phone, I wrote Mr. Freund to verify his statement and he responded with the attached letter (see enclosure).

The other constitutional lawyers we have contacted have responded very similarly to Mr. Freund.

I hope this information will be helpful.

Sincerely,

Florian Chmielewski

Senator Florian Chmielewski
Chairman, Employment Committee

COMMITTEES • Employment Committee, Chairman • Taxes and Tax Laws • Transportation • Rules • Veterans Affairs • Ex-Officio Member of Indian Affairs Intertribal Board

HARVARD LAW SCHOOL
CAMBRIDGE · MASSACHUSETTS · 02138

April 25, 1983

Senator Florian Chmielewski
325 State Capitol
St. Paul, MN 55155

Dear Senator:

Thank you for your letter of April 12, enclosing an excerpt from my statement to your office on the state ERA.

The statement is accurate, except that in the next to last line, "other courts" should read "the courts."

Sincerely,

Paul Freund

Paul Freund

PF/cak

enclosure

YALE UNIVERSITY LAW SCHOOL,
New Haven, CT, January 15, 1974.

MS. CRES APPRILL,
5820 Itaska Street
St. Louis, MO

DEAR MS. APPRILL: You are right that the article on the Equal Rights Amendment in the Yale Law Journal was published prior to the abortion decision of the Supreme Court. The main reason we did not discuss the abortion problem in the article was that abortion is a unique problem for women and hence does not really raise any question of equal protection. Rather the question is one that is concerned with privacy.

I think that the ratification of the Equal Rights Amendment, while it would not affect the abortion situation directly, would indirectly have an important effect in strengthening abortion rights for women. The passage of the Amendment would reflect a concern on the part of the American people with women as human beings and thus would certainly carry over into the abortion picture.

Thank you for writing.

Sincerely,

THOMAS I. EMERSON.

LAW OFFICES
BALL & SKELLY
[illegible] N. SECOND STREET
P.O. BOX [illegible]
HARRISBURG, PENNSYLVANIA 17108

WILLIAM BENTLEY BALL
JOSEPH G. SKELLY
PHILIP J. MURREN
RICHARD E. CONNELL
SANDRA E. WISE
MICHAEL CHEREWKA

TELEPHONE
AREA CODE 717
[illegible]

January 16, 1984

MEMORANDUM

As a constitutional lawyer, and having closely observed legal developments relating to the subject of abortion over the past quarter century, it is my considered opinion that the adoption, by our nation, of the Equal Rights Amendment to the federal Constitution would constitute a significant advance of the pro-abortion movement, leading to an even more massive loss of life in our country than presently obtains. Adoption of ERA would have numerous ill consequences, as leading scholarly critics of the Amendment have noted, but one of the worst of these would be to create a legal premise from which certain conclusions respecting abortion would become inevitable. In spite of the dire situation created by the Supreme Court decision in Roe v. Wade, Americans can still justifiably entertain hope that a better informed and more principled Court will, in the future, overrule that unfortunate holding. Indeed, even within the present membership of the Court, there have been some strong indications of a desire for revision. ERA would blight those hopes.

There is every likelihood that ERA would be considered totally reenforcing to the concept of abortion on demand. I regard it as undeniable that the adoption of ERA will close the door to liberty for the unborn in the future and open the door to attacks on human life going even beyond abortion. It will be seen as creating legal justification for unlimited abortion funding.

I should not want this statement relating to abortion to be thought in any way to diminish my other objections to ERA, which I have elsewhere stated on other grounds. It remains my firm conclusion that womens' rights are not protected by ERA, and that no such amendment to the Constitution is necessary in order that justice for women may be legally established. I do regard ERA as the most divisive measure conceivable - one that will breed confrontations and conflicts in American society for long years to come.

William B. Ball

[From the Chicago Catholic, Feb. 24, 1984]

ERA AND ABORTION

(By Cardinal Bernardin)

Without presuming to play political pundit, I take it as a fact that Washington observers know what they are talking about in assuring us the Equal Rights Amendment will be an important issue on Congress' agenda this year. I also take it as a fact that this means the question of ERA's relationship to abortion will receive intense scrutiny.

The point I wish to make is simple: It is necessary to amend ERA in order to ensure that, whatever else it does, it does not confer a right to abortion or public funding of abortion. Before developing that theme, however, I see a need to make certain clarifications and distinctions. The first clarification is this. Like the rest of the Catholic bishops in the United States, I support equality of rights for women under the law as a noble and necessary goal. Legally imposed or sanctioned discrimination against women has no place in our nation.

But a crucial distinction is also required. Neither I nor the bishops collectively have up to this time taken a position for or against the Equal Rights Amendment as such. There is no inconsistency in that. Whether or not ERA is an appropriate means for achieving equality of rights is a complex questions whose answer is far clear. I am not going to answer it here.

There is, however, much room for concern that ERA, as it stands, might be interpreted by the courts as guaranteeing a right to abortion and the public funding of abortion. True, some of its supporters say this would not necessarily happen. But others, both supporters and opponents, are convinced it would and offer reasons to support their view. What they say must be taken seriously.

Again, I am not going to try to resolve this particular question here. My point is different. There are serious grounds for concern that the Equal Rights Amendment, as it now stands, would be read by the courts as guaranteeing a "right" to abortion and a "right" to tax funds for abortion. Since this is so, there is need to amend the amendment to make sure it doesn't happen.

A proposal to acomplish that was introduced in Congress last year. Its principal sponsor in the House of Representatives is Rep. F. James Sensenbrenner of Wisconsin. Its language is straightforward: "Nothing in this Article shall be construed to grant or secure any right relating to abortion or the funding thereof." I support it, and I believe it deserves the support of anyone who does not wish to see abortion and abortion funding enshrined in the Constitution by a pro-abortion reading of ERA on the part of courts. The Sensenbrenner amendment has already played a role in the congressional history of the Equal Rights Amendment. Last November ERA came to the floor of the House under a procedure which ruled out debating and voting on proposals for modifying it or clarifying its intent. The dismay of congressmen who opposed this procedure apparently contributed to ERA's failure to receive the two-thirds vote required for passage. I urgently hope that, when ERA comes up again in Congress, our representatives will have ample opportunity to consider the Sensenbrenner amendment.

Last November, too, the United States Catholic Conference joined other pro-life groups in supporting Congressman Sensenbrenner's proposal. The reason offered in a letter to members of the House by Msgr. Daniel F. Hoye, the Conference's General Secretary, makes good sense: "The Sensenbrenner amendment underlines what is already apparent to many supporters of women's rights—namely, that the equality of women has nothing to do with abortion."

I see little logic in the position of any supporter of the Equal Rights Amendment who would argue that he or she opposes legalized abortion but also opposes amending ERA to make it clear it does not guarantee a right to legalized abortion. At the very least, ERA's thrust and implications on this point are far from clear. The Sensenbrenner amendment would supply the clarity which is now lacking.

There is, however, plenty of logic in the stand taken by those who oppose amending ERA along these lines for the very reason that they believe the courts would interpret it as guaranteeing an abortion "right." This in fact seems to be the position adopted by not a few. From a pro-life point of view, that is a further argument for Congressman Sensenbrenner's proposal.

Women's rights deserve legal recognition and protection, but this goal should not be confused with extraneous and unacceptable objectives like guaranteeing a "right" to abortion and abortion funding. As Congress resumes consideration of the Equal Rights Amendment, I hope it will keep this principle clearly in mind.

13-4-19-84

BISHOPS SAY THEY WILL OPPOSE ERA WITHOUT ANTI-ABORTION AMENDMENT (570)

WASHINGTON (NC) — The National Conference of Catholic Bishops announced April 19 it will ''have no alternative but to oppose'' the Equal Rights Amendment if a clause is not added excluding abortion and abortion funding from its scope.

In a news release the NCCB said its Administrative Committee in March approved a resolution stating the new position on ERA ''because of the serious moral problems'' that would be presented by an ERA without the inclusion of an anti-abortion clause.

The NCCB also announced establishment of an ad hoc interdisciplinary committee to study implications of the ERA. The committee is chaired by Archbishop John L. May of St. Louis, NCCB vice president.

Msgr. Daniel F. Hoye, NCCB general secretary, said the Administrative Committee at its March meeting had noted recent developments in Congress and the courts which he said raise questions about ERA's implications not only for abortion but for private educational institutions, the tax-exempt status of charitable organizations, religious exemptions in federal grant statutes and government aid programs.

''In general, it seems fair to say that the potential gravity of the amendment's implications is the product not so much of its own terms as originally understood by sponsors and supporters, as it is of an ambiguous congressional record and the interaction among ERA, legislative enactments and other legal principles,'' Msgr. Hoye said in a statement.

The ad hoc committee studying the implications of the ERA will present its findings and recommendations to the Administrative Committee in September, the NCCB said.

Previously the bishops have taken no position on the ERA itself. Last fall, without changing its basic neutrality, the bishops' conference announced support for a proposed amendment to the ERA sponsored by Rep. F. James Sensenbrenner, R-Wis., which supporters say would make ERA ''abortion neutral.''

Major supporters of the ERA, such as the National Organization for Women, want Congress to resubmit the proposal to the states for ratification without amendment.

The NCCB statement said that at the March Administrative Committee meeting a joint report on the issue was presented by the NCCB Committee on Pro-Life Activities, chaired by Cardinal Joseph Bernardin of Chicago, and by Wilfred Caron, NCCB general counsel.

The statement said the Administrative Committee also discussed a March 9 ruling in which the Commonwealth Court of Pennsylvania used that state's ERA to strike down Pennsylvania's prohibitions on public funding of abortions. Pro-life groups have argued that a federal ERA similarly could affect federal abortion restrictions.

Msgr. Hoye said the Administrative Committee in its discussion reaffirmed the bishops' commitment to women's rights.

''The discussion made clear the committee's concern that there be no doubt about the conference's fundamental commitment to civil rights and the dignity of the person, and its support of governmental and private efforts to promote fair treatment of all people and prevent all forms of wrongful discrimination between the sexes,'' he said.

The Administrative Committee is a panel of some 40 bishops which conducts the business of the NCCB between annual general meetings.

The proposed federal ERA states, ''Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.''

In a column in the National Catholic Register March 11, Russell Shaw, U.S. bishops' secretary for public affairs, said that Catholics could not support the ERA without an anti-abortion clause because courts would interpret the amendment as guaranteeing a ''right'' to abortion.

END

BACK PAGE

BY RHONDA COPELON

ABORTION RIGHTS

Where Do We Go from Here?

ABORTION-RIGHTS LITIGATORS and activists had awaited with dread the Supreme Court's action in the abortion cases last spring. Rumors from inside the Court had predicted a significant erosion of the right to abortion, recognized in the 1973 *Roe v. Wade* decision.

The Reagan Administration had chosen these cases to challenge the Court's authority to protect constitutional rights. Echoing local school boards that 30 years ago claimed the right to maintain segregated schools, the Administration urged that controversial issues involving constitutional rights be resolved by legislatures. Would this outrageous, frontal attack intimidate the Court or galvanize a majority to defend *Roe v. Wade*?

The answer was a forceful reaffirmation of *Roe v. Wade* and clear rejection of regulatory efforts to obstruct and delegitimize abortion. By a 6 to 3 vote, the Court invalidated requirements that second-trimester abortions be done in hospitals; that women be subjected to a barrage of frightening, misleading, and false information in the guise of "informed consent" and then wait 24 hours before having an abortion; and that counseling must be done only by physicians.

Less than two weeks later, the Senate defeated by a vote of 50 to 49 the proposed "states' rights" constitutional amendment to nullify *Roe v. Wade*. Pro-choice lobbyists had expected to defeat the amendment, which required a two-thirds vote in both Houses (67 votes in the Senate), but were amazed by the extent of the margin.

While the right to abortion has weathered a 10-year storm, it is nonetheless exceedingly vulnerable. The Court's majority position is by no means secure. Justice Sandra Day O'Connor's dissenting opinion essentially accepts the Reagan Administration's position, demonstrating a deep hostility to both the right to abortion and the Court's duty to protect it. Her decision indicates that should Reagan appoint additional Justices, the majority could easily be lost. (O'Connor's advocacy of sweeping cutbacks on the Court's power to protect civil rights—views that led to her appointment to the Court—made her decision predictable and underscores once again the need for feminists to be circumspect about endorsing women for powerful positions who have not demonstrated real commitment to the rights of women and minorities. Justice Thurgood Marshall, the High Court's first black justice, was a leading activist for civil rights and remains one of the Court's strongest defenders of the rights of women.)

Moreover, this victory is not complete. By a bare majority, the Court permitted states to condition minors' abortions on parental consent or a judicial decree. Such laws, already in effect in a handful of states, have caused a substantial drop in abortions despite the fact that all minors brave or savvy enough to go to court to get the necessary judicial approval have received it.

The Court also places heavy reliance on "accepted medical practice" (in drawing the line between "reasonable" restrictions on abortion and obstructionistic ones), perpetuating a problem that has dogged women's struggle for abortion rights since the beginning of second-wave feminism: the relationship between the rights of women and the power of the medical profession.

In the recent cases women and doctors united to oppose spurious restrictions justified on health grounds. Where our interests do not coincide, however, the result is over-professionalization. For example, medical professionals other than M.D.s are able to perform early abortions, yet the Supreme Court uncritically assumes the necessity of a doctor. Judicial reliance on "acceptable medical practice" also threatens increasing interventions in pregnancy and childbirth—efforts, for example, to overregulate midwives, require cesareans, or otherwise dictate "high-tech" birthing.

Just as a judicial decision cannot secure abortion rights, neither can a couple of victories in the Senate. Abortion rights foes sought the June vote on [illegible] antiabortion amendment to build opposition to pro-choice candidates in the 1984 elections. The recent decisions underscore their need for some kind of constitutional amendment to ban abortions, and the vote made clear that the antiabortion purists who insist on fetal personhood will nonetheless vote for any restrictive measure.

Moreover, so long as abortion is not recognized as an essential part of a basic health care system and as an entitlement of the poor as well as the moneyed, women are in jeopardy and the right to abortion is no more than a privilege. This is the time to take the offensive to win back Medicaid reimbursement for poor women and ensure the inclusion of abortion in numerous federal programs. We must bring pressure on local hospitals to provide abortions, and on the clinics to assure feminist counseling and delivery of services, a matter of particular importance to teenagers. We must also immediately fight local legislative efforts to restrict teenagers' access.

It is important, too, for feminists to integrate abortion-rights campaigns with the broader task of assuring all reproductive health and sexual rights. Coerced or uninformed sterilization, infant mortality and the lack of child care, decent health care, and other resources to nurture a child all function to deny basic reproductive rights particularly to poor, black, and Third World women. Our work must also recognize that the right to be lesbian—like the right to abortion—is essential to all women's sexual self-determination.

Finally, we must work to reintegrate reproductive and sexual rights into the concept of equality. Abortion is essential to women's rights to bodily integrity, privacy, free expression and association, and the freedom from involuntary servitude. Without the ability to decide whether and when to bear children, women lack a prerequisite to equality. The separation of abortion from the campaign for the ERA has jeopardized abortion and produced a truncated version of liberation.

False confidence 10 years ago led women to rely on judicial victories and to underestimate the opposition. The decisions of the Court and the hard-won vote in the Senate have given us a reprieve and the opportunity to move forward, not an excuse for sitting back.

Rhonda Copelon is an associate professor at the CUNY Law School at Queens College and is a volunteer staff attorney with the Center for Constitutional Rights.

A longer version of this article was published by the National Lawyers Guild.

National Organization for Women, Inc.
425 13th Street, N.W. Suite 723 Washington, D.C. 20004 • (202) 347-2279

Resolution on ERA
Passed at National NOW Conference
October 2, 1983

WHEREAS, the Equal Rights Amendment embodies the fundamental principles of women's equality and has been studied, and explained, and interpreted for some fifty years, and

WHEREAS, it is patently obvious that the current hearings are being used by the opposition as a dilatory and divisive tactic, and

WHEREAS, talk is no substitute for action and whereas the ERA is not negotiable, and

WHEREAS, both the gender gap and women's political power are a direct result of the drive for the ratification of the ERA, and

WHEREAS, the members of Congress introduced the ERA because they believed the time was right for ERA passage, and

WHEREAS, we vowed on June 30th not to beg male legislators for our rights any longer but to replace anti-women's rights legislators with feminist candidates to achieve direct political power for women, and

WHEREAS, people have the right to know where their Representatives and Senators stand on this fundamental issue before the elections,

THEREFORE, BE IT RESOLVED, that the National Organization for Women serves notice on Congress that we will accept no amendments to the ERA and that any sponsor willing to accept amendments should remove her or his name from the list of sponsors.

THAT WE DEMAND a vote on the Equal Rights Amendment before the 1984 primaries.

AND WE PLEDGE that the ERA will be a central national domestic issue for the 1984 elections--not only will we remember in November, but we will make sure the nation does also.

COPY

JOANNE FISCHER, et al.,
Petitioners
v.
DEPARTMENT OF PUBLIC WELFARE,
et al.,
Respondents

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

NO. 283 C.D. 1981

BEFORE: JOHN A. MacPHAIL, Judge

HEARD: February 7, 1984

OPINION NOT REPORTED

* * * * * * *

Although we have now decided that the statutes before us do offend the equal protection clauses of our state constitution, we deem it necessary to briefly consider the constitutional challenge based upon Pennsylvania's Equal Rights Amendment (ERA), because we believe that on appellate review it may be helpful for the reviewing court to have our opinion with respect to each of the constitutional challenges before us.

Our Supreme Court has categorically stated that the purpose of the ERA is to eliminate sex as a "classifying tool." Snider v. Thornburgh, 496 Pa. 159, 176, 436 A.2d 593, 601 (1981).

Petitioners contend, of course, that the statutes now before us do make a discriminatory distinction based solely upon sex. The Commonwealth is equally insistent that statutes based upon the unique physical characteristics of one sex do not constitute sex discrimination under the ERA. The Commonwealth relies upon case law such as Geduldig v. Aiello, 417 U.S. 484 (1974) which holds that where legislation related to pregnancies is involved, the classification is not between men and women but between pregnant women and non-pregnant persons and, therefore, is not gender-based.

We believe Pennsylvania case law is to the contrary. In *Anderson v. Upper Bucks County Area Vocational Technical School*, 30 Pa. Commonwealth Ct. 103, 110, 373 A.2d 126, 130 (1977), this Court held that "since pregnancy is unique to women, a disability plan which expressly denies benefits for disability arising out of pregnancy is one which discriminates against women employes because of their sex." In *Cerra v. East Stroudsburg Area School District*, 450 Pa. 207, 213, 299 A.2d 277, 280 (1973), our Supreme Court held that a discharge from employment because of a physical condition peculiar to women, *i.e.* pregnancy, is "sex discrimination pure and simple." Again, in *Henderson v. Henderson*, 458 Pa. 97, 101, 327 A.2d 60, 62 (1974), our Supreme Court held that our law "will not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman."

Further, as this Court has noted, our Supreme Court has recognized that the ERA "is not confined to the matter of individual 'rights' in the sense of entitlements, but equally extends to elimination of discrimination with respect to burdens and obligations 'under the law.'" *Hartford Accident and Indemnity Co. v. Insurance Commissioner*, 65 Pa. Commonwealth Ct. 249, 255, 442 A.2d 382, 385 (1982). Thus, while the Pennsylvania courts are willing to discuss the possible justifications for discrimination, they have, at the same time, given weight to the unqualified language of the ERA.

The Commonwealth argues to us that the indigent women in need of medically necessary abortions would be in equally bad circumstances if there were no Medical Assistance program. That argument misses the mark. There *is* a Medical Assistance program and once the legislature has decided to grant financial assistance to the medically needy, it cannot exclude persons from that grant on the basis of sex. In Commonwealth v. Pennsylvania Interscholastic Athletic Association, 18 Pa. Commonwealth Ct. 45, 334 A.2d 839 (1975), this Court sustained a constitutional challenge brought under the ERA to rule-making by the Pennsylvania Interscholastic Athletic Association, which we held to be state action, which would have prohibited girls from competing against boys in interscholastic sports. Judge Blatt wrote for the majority, that "[t]here is no fundamental right to engage in interscholastic sports, but once the state decides to permit such participation, it must do so on a basis which does not discriminate in violation of the constitution." Id. at 51, 334 A.2d at 842.

We are of the opinion that while Petitioners' argument under the ERA is not as strong as their equal protection argument, it is meritorious and sufficient in and of itself to invalidate the statutes before us in that those statutes do unlawfully discriminate against women with respect to a physical condition unique to women.

In summary we hold that the state may not constitutionally deny Medical Assistance funds to indigent pregnant women who seek medically necessary abortions.

* * * * * * *

IN THE SUPREME COURT OF PENNSYLVANIA

JOANNE FISCHER, et al.,	:	
Petitioners	:	
	:	**No. 67 M.D.**
v.	:	**APPEAL DOCKET 1984**
	:	
DEPARTMENT OF PUBLIC WELFARE,	:	**No. 69 M.D.**
et. al.,	:	**APPEAL DOCKET 1984**
Respondents	:	

BRIEF OF APPELLANTS, JOANNE FISCHER, PLANNED PARENTHOOD OF SE. PENN. ET AL.

KATHRYN KOLBERT
SUSAN CARY NICHOLAS
Women's Law Project
112 South 16th Street, Suite 1012
Philadelphia, Pennsylvania 19102
(215) 564-6280

SETH KREIMER
University of Pennsylvania School of Law
3400 Chestnut Street
Philadelphia, Pennsylvania 19104
(215) 898-7447

ROBERT F. WILLIAMS, ESQUIRE
Rutgers University Law School
5th and Penn Streets
Camden, New Jersey 08102
(609) 757-6372

Dated: November 28, 1984

* * * * * * *

IV. 18 Pa. C.S. §3215(c) DENIES EQUALITY OF RIGHTS UNDER LAW BECAUSE OF SEX, IN VIOLATION OF THE PENNSYLVANIA EQUAL RIGHTS AMENDMENT.

The exclusion of medically necessary abortions from coverage under the state's Medical Assistance Program constitutes sex discrimination in violation of the Pennsylvania Equal Rights Amendment, Article I, Section 28 of the Pennsylvania Constitution. This conclusion, which was reached by Judge MacPhail, Chancellor's Opinion p.21, is amply warranted by the facts of record and controlling law.

Until the adoption of 18 Pa. C.S. §3215(c), the Medical Assistance Program of Pennsylvania was among the most comprehensive in the nation (Stip. 50), and the program provided funding for all generally accepted and medically necessary services (Stips. 53-73). Since the adoption of these statutes, the touchstone of the program in all areas except for abortions has remained medical necessity. Chancellor's Opinion pp. 4 and 5. All medically necessary surgical services for men remain reimbursable; even all expenditures for male reproductive services remain within the program (Stips. 67 and 69). By contrast, abortions, which are provided only to women, are singled out for special and adverse treatment (Stip. 68) and require the physician to show that the procedure is necessary to avert a woman's death. Thus, in the context of a program designed to promote health for all indigent people, the state has adopted a standard entirely different from that which governs benefit eligibility for men. Only women are excluded from receiving medically necessary health care.

Moreover, as Judge MacPhail found, if 18 Pa. C.S. §3215(c) goes into effect, some of the 4,000 female victims who will be forced to bear their pregnancies to term will suffer severe long term health consequences as a result of the cutback in funding including blindness, seizures, renal failure, emotional trauma or even death (Stips. 142-144), Chancellor's Opinion p. 5. No men will endure similar disabilities. The record also demonstrates that women who, like the 4,000 per year in this case, are forced to bear children against their will are less able to take advantage of work opportunities or educational programs which might enable them to become financially independent. Young women especially are thrown into a "cycle of poverty" from which escape is virtually impossible (Stips 157, 160). No men are similarly coerced by the program to suffer such hardships.

Even among the women who will be able to raise the funds to pay for medically necessary abortions, the task of accumulating the required resources will result in health and life-threatening delay in meeting their medical needs, and sacrifices of food, shelter, and clothing (Stips. 149-153), Chancellor's Opinion p. 8. Among the 29% of women who are less than 19 years old (Stip. 109), the effects will prove devastating (Stip. 154), Chancellor's Opinion p. 8. No indigent men are forced to choose between necessary medical care and food, shelter or clothing for their families.

None of these effects is unexpected; all are intended and all are directed exclusively against women. As Judge MacPhail held, "by singling out a group of women to bear special burdens, and depriving these women of the benefits of a generally available Medical Assistance Program, the statutes at issue violate the Pennsylvania Equal Rights Amendment." Chancellor's Opinion pp. 18-21.

Adopted in 1971, the Pennsylvania ERA, Article I, §28 of the Pennsylvania Constitution provides:

> Equality of rights under the law shall not be abridged in the Commonwealth of Pennsylvania because of the sex of the individual.

Judge Craig recently emphasized in *Hartford Accident and Indemnity Co. v. Insurance Commissioner*, 65 Pa. Cmwlth. 249, 442 A.2d 382, 385 (1982) *affirm'd* (No. J-76-1984) Slip Op (1984), the "great weight which the Supreme Court has ascribed to the unqualified terms of the Pennsylvania ERA.* In Pennsylvania, it is simply impermissible for sex to determine the status of an individual, or the individual's access to governmentally-conferred rights and privileges. The standard was first articulated in Pennsylvania in *Henderson v. Henderson*, 458 Pa. 97, 101; 327 A.2d 60, 62 (1974):

> The thrust of the Equal Rights Amendment is to insure equality of rights under the law and to eliminate sex as a basis for distinction. The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities. *The law will not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman*.

Id. at 62 (emphasis added), *quoted with approval Hartford Accident*, *supra*. 442 A.2d at 384. This standard has been consistently followed since that time, *DiFlorido v. DiFlorido*, 459 Pa. 641, 331 A.2d 174 (1975) (invalidating presumption that husband was the sole owner of untitled household goods); *Butler v. Butler*, 464 Pa. 522, 347 A.2d 477, 480 (1975) (quoting the last sentence of the above passage); *Commonwealth v. Butler*, 458 Pa. 289, 328 A.2d 851, 855 (1974) (court repeated the ban on classifications which burden individuals on the basis of gender and invalidated legislation prohibiting minimum sentences for women).

In no case since ratification of the state ERA in 1971 has the Pennsylvania Supreme Court allowed a statute or rule of law that discriminated on the basis of sex to stand. The Court has rejected the offending provisions, as in *Commonwealth v. Butler*, *supra*, 328 A.2d 851; reshaped common law presumptions *e.g.*, *DiFlorido v. DiFlorido*, *supra*., 331 A.2d 174 (substituting presumption of joint, equal ownership of untitled marital property for former common law presumption of husband's exclusive ownership); or extended statutory rights and obligations to both sexes, as in *George v. George*, 487 Pa. 133, 409 A.2d 1 (1980) (holding divorce AMET obtainable by husbands as well as wives).

In this litigation the majority acknowledged that the statute at issue has a basis in gender, for only women may choose to have an abortion. Majority Opinion p.16. Nonetheless the court rejected Judge MacPhail's reasoning and adopted instead an analysis similar to that set forth by the United States Supreme Court in Geduldig v. Aiello, 417 U.S. 484 (1974), i.e. that discrimination on the basis of pregnancy is not sex discrimination, but merely a distinction between "pregnant and non-pregnant persons." Id. at 496-497, n.20.

The Commonwealth Court's reliance on this Geduldig analysis directly contravenes Pennsylvania case law and ERA legislative history, and would drastically undermine the meaning and impact of the state ERA. Rather, in order to ensure that the amendment's goal of eradicating sex discrimination is not undermined, this Court must subject classifications based on unique physical characteristics to the most rigorous scrutiny.

The necessity for strict judicial scrutiny in this context stems from the recognition that legal guarantees of equality are of little use if they can be circumvented simply by disguising discrimination under the cloak of characteristics possessed by only one sex. For example, requirements that pregnant workers take unpaid leave beginning at some fixed point in the pregnancy, denials of sick leave or unemployment insurance to pregnant women, and rules excluding pregnant students from public education programs are all policies which are based on sex-specific characteristics rather than gender per se. Yet each obviously and directly discriminates against women and undermines their equal rights.

Pennsylvania courts have long recognized that to treat women differently on the basis of pregnancy is to discriminate on the basis of their sex. In Cerra v. East Stroudsburg Area School District, 450 Pa. 207, 299 A.2d 277 (1973), this Court construed the Pennsylvania Human Relations Act, 43 Pa. C.S. 951 et seq., and invalidated a regulation which required a female teacher to resign her job after five months of pregnancy. "In short, Mrs. Cerra and other pregnant women are singled out and placed in a class to their disadvantage. They are discharged from their employment on the basis of physical condition peculiar to their sex. This is sex discrimination pure and simple." 450 Pa. at 213, 299 A.2d at 289 (emphasis added). See also West Middlesex Area School District v. Commonwealth Human Relations Commission, 39 Pa. Cmwlth. 58, 62, 394 A.2d 1301, 1304 (1978); Freeport Area School District v. Commonwealth Human Relations Commission, 18 Pa. Cmwlth. 400, 407, 335 A.2d 873, 877 (1975) modified, 467 Pa. 522, 359 A.2d 724 (1976); Dallastown Area School District v. Pennsylvania Humans Relation Commission, 74 Pa. Cmwlth. 560, 460 A.2d 830, 878 (1983).

Similarly, Anderson v. Upper Bucks County Area V.T. School, 30 Pa. Cmwlth. 103, 373 A.2d 126, 130 (1977), allocatur refused May 2, 1978, in the context of the Pennsylvania Human Relations Act, 43 Pa. C.S. 951 et seq., held discriminatory a policy which excluded disabilities caused by pregnancy from an otherwise comprehensive disability package:

> We believe that since pregnancy is unique to women, a disability plan which expressly denies benefits for disabilities arising out of pregnancy is one which discriminates against women employees because of their sex.

See also TransWorld Airlines v. City of Philadelphia, 44 Pa. Cmwlth. 341, 403 A.2d 1057 (1979). As Chief Judge Crumlish noted in Leechburg Schools v. Human Relations Commission, 19 Pa. Cmwlth. 614, 339 A.2d 850 (1975), the protection against sex discrimination, "is not to be diluted because the discrimination affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex". Id. at 619, quoting Sprogis v. United Airlines, 444 F.2d 1194, 1198 (7th Cir. 1971) cert. den. 404 U.S. 991.

While this Court's doctrine regarding pregnancy and sex discrimination arose in the interpretation of the Human Relations Act's prohibition of discrimination "because of the...sex of any individual", 43 Pa. C.S. §955(a)(1), this Court has acknowledged that concepts of sex discrimination developed under the Human

Relations Act are useful in construing the Equal Rights Amendment's prohibition of denial of equal rights "because of the sex of the individual". Snider v. Thornburgh, 496 Pa. 159, 436 A.2d 593, 601 (1981). See also Leechburg Area School District, 19 Cmwlth. at 619, n.2, 339 A.2d 850, n.2 (1975).

Moreover, the Pennsylvania ERA, an amendment to our fundamental state charter, demands at least as scrupulous a concern for equality as the Pennsylvania Human Relations Act. The central principle of the ERA--that rights, privileges, duties, and responsibilities should not be assigned on the basis of sex--prohibits the legislature not only from explicitly classifying based on sex but also from reinforcing inequality of the sexes through classifications based on sex-unique physical characteristics, such as pregnancy. As the plight of petitioners in this case clearly demonstrates, to deny this obvious fact would place beyond reach of the equality principle some of the most invidious and detrimental discrimination, a result clearly at odds with the Commonwealth's adoption of its Equal Rights Amendment. While the test is not inflexible, and recognizes that in some limited circumstances legislative classifications based on sex-specific characteristics may not create or maintain sexual inequality,[26] in order to ensure that the thrust of the Amendment is furthered, i.e. "to insure equality of rights under the law and eliminate sex as a basis of distinction," Henderson v. Henderson, 458 Pa. 97, 327 A.2d 60 (1974), classifications based on unique physical characteristics must be subjected to strict judicial scrutiny and must be justified by no less than compelling state interests.

Relevant legislative history confirms this interpretation. The necessity to subject this kind of classification to close review was first articulated in an authoritative law review article which provided a detailed analysis of the meaning and intent of the federal ERA, and has been relied upon by

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[26] For example laws regulating sperm bank donors, or research projects that study hemophilia, a sex-linked blood defect in males, do not contribute to the inequality of the sexes.

Pennsylvania courts to interpret the similarly worded Pennsylvania amendment. Brown, Emerson, Falk and Freedman, *The Equal Rights Amendment: A Constitutional Basis For Equal Rights For Women*, 80 Yale L.J. 871 (1971) (hereinafter "Brown article").[27] It states that the proposed federal ERA "does not preclude legislation which regulates, takes into account or otherwise deals with a physical characteristic unique to one se.." The article further states:

> A court faced with deciding whether a law relating to a unique physical characteristic was a subterfuge [for discrimination against one sex] would look to a series of standards of relevance and necessity. *These standards are the ones the courts now consider when they are reviewing, under the doctrine of strict scrutiny, laws which may conflict with fundamental constitutional rights*.

80 Yale L.J. 871, 894 (1971) (emphasis added).

More recent legislative history of the proposed federal ERA[28] has continued to focus on the rigorous scrutiny that the ERA requires for classifications based on physical characteristics unique to one sex. Professor Ann E. Freedman, one of the authors of the Brown article, has stated at Congressional hearings on the ERA:

> The ERA also requires strict scrutiny of classifications based on physical characteristics unique to one sex to assure that such classifications do not undermine equality of the sexes. To treat people differently on account of characteristics unique to one sex is to treat them differently on account of their sex. Although such classifications are not prohibited outright, because there are a limited number of circumstances in which the use is justified, the state would bear the burden of demonstrating that such classifications are necessary and the reasons for them compelling. The dissent of Justice Brennan in *Geduldig v. Aiello* illustrates

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[27] *See, e.g.*, *Wiegand v. Wiegand*, 226 Pa. Super. Ct. 278, 285-6, 310 A.2d 426 (1973), *rev'd. on other grounds*, 461 Pa. 482 (1975); *Commonwealth v. Butler*, 458 Pa. 289, 328 A.2d 851, 855 (1974); *Corso v. Corso*, 59 D.&C.2d 546 (1972), all citing the Brown article. The Brown article, which defendants concede is the leading article on the ERA, is referred to extensively in the debates which preceded final passage of the ERA by Congress, and was termed "primary legislative history" of the amendment. 118 Cong. Rec. 9907 (1972).

[28] The proposed federal ERA was not ratified by the required number of states within its time limit. It was reintroduced into Congress on January 3, 1983, as H.J.Res. 1, and has been the subject of Congressional hearings since May 26, 1983.

> the approach contemplated by the ERA. ... The ERA would provide a constitutional foundation for the protection of women from governmental discrimination based on such stereotypes.

Testimony of Professor Ann E. Freedman Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee on H.J. Res. 1, the Equal Rights Amendment at 5. See also Testimony of Professor Thomas I. Emerson Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee on H.J. Res. 1, the Equal Rights Amendment, at 7.[29]

Proper ERA analysis requires then that the Commonwealth justify the classifications drawn by this statute by a compelling state interest, a standard which it is clearly unable to meet. As Judge MacPhail found, neither the states interest in the health of the woman nor the protection of fetal life is compelling:

> Roe v. Wade also held that a state's interest in potential life may never outweigh the superior interest in the life and health of the mother; this is true even though the state has two separate and district interests -- the health of the mother and the potentiality of human life.

Chancellor's Opinion p. 17.

This was first explicitly established in Roe v. Wade, 410 U.S. 113, 155 (1973) and more recently reaffirmed by the United States Supreme Court in City of Akron v. Akron Center for Reproductive Health, ___ U.S. ___, 103 S.Ct. 2481, 2491-92 (1983). The Court in Roe held that the state has a legitimate interest in protecting potential life that "grows in substantiality as the woman approaches term, and at a point during pregnancy, each becomes compelling." Roe v. Wade, supra., 410 U.S. at 162-63. The Court went on to explain:

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after

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[29] Copies of these statements are attached to this Brief for the court's convenience at Exhibit I and J.

> viability, it may go so far as to proscribe abortion during that period, *except when it is necessary to preserve the life or health of the mother*.

Id. at 163, 164 (emphasis added), *City of Akron v. Akron Center for Reproductive Health*, ___ U.S. ___, 103 S.Ct. 2481, 2491-92 (1983). In light of the fact that 99.6% of the abortions performed in Pennsylvania took place before the third trimester and viability (Stips. 81 and 82), and that all abortions at issue here are necessary to preserve the woman's health (Stips. 75-77), the interests asserted here are neither compelling nor sufficient to justify classifications which so markedly contribute to the inequality of the sexes.

Nor can the Commonwealth properly characterize the statute at issue as a mere allocation within a social welfare program, recalling the *McRae* analysis, in order to reduce the level of scrutiny applicable under the ERA. At the very core of anti-discrimination law is the principle that when the government acts, it must treat a protected class in an evenhanded manner. See e.g., *Commonwealth v. Pennsylvania Interscholastic Athletic Association*, 18 Pa. Cmwlth. Ct. 45, 334 A.2d 839 (1975). This core principle is antithetical to the notion advanced by the Commonwealth that the government has unlimited power to allocate public benefits among its citizens. Under the Commonwealth's position, for example, a state could rationalize the exclusion of all women from participation in the food stamp program, or rule out all minority women from receiving low income energy assistance, by claiming that the inability of indigent women to obtain food or fuel is a result of their poverty, not of any direct action by the state. Just as here, a state could argue that it is under no independent obligation to provide food or fuel to its citizens. In short, the *McRae* view that the state may freely allocate public benefits without constitutional limitation is wholly inappropriate to sex discrimination analysis and would effectively negate constitutional guarantees of equal treatment. The strict scrutiny required by the Pennsylvania ERA reveals that the statute at issue here serves no compelling state interest, Roe v. Wade, supra, 410 U.S. at 162-63, and must therefore be invalidated by this Court.

V. CONCLUSION

For the reasons set forth above the decision of the Commonwealth Court en banc, entered September 20, 1984 must be reversed. The statute at issue, 18 Pa. C.S. §3215(c) must be declared to violate Article I, §1, Article III, §32, Article I, §26 and Article I, §28 of the Pennsylvania Constitution, and the Commonwealth defendants must be permanently enjoined from enforcement of its provisions.

Respectfully submitted,

Kathy Kolbert

KATHRYN KOLBERT
SUSAN CARY NICHOLAS
Women's Law Project
112 South 16th Street, Suite 1012
Philadelphia, Pennsylvania 19102
(215) 564-6280

SETH KREIMER
University of Pennsylvania
School of Law
3400 Chestnut Street
Philadelphia, Pennsylvania 19104
(215) 898-7447

JUDICIAL DISTRICT OF NEW HAVEN
SUPERIOR COURT
FILED

NO. 19 68 74

ROSIE J. DOE, ET AL. : SUPERIOR COURT

V. : JUDICIAL DISTRICT OF NEW HAVEN

EDWARD MAHER, ET AL. : OCTOBER 9 , 1981

MEMORANDUM OF DECISION ON MOTIONS FOR CLASS CERTIFICATION, MOTION FOR TEMPORARY INJUNCTION AND CERTAIN OTHER MOTIONS

This is an action brought by the plaintiffs which raises the central question of whether the state under its medical assistance program for the indigent must pay for medically necessary abortions. The plaintiffs Rosie J. Doe and her physician Marshall Holley seek, inter alia, a declaratory judgment that the state's policy which provides that payment will be made for the costs of an abortion only when the life of the woman would be endangered if the fetus were carried to term is in violation of the state constitution. The plaintiffs also seek class certification and temporary and permanent injunctive relief requirements. . . .

* * * * * * *

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The constitutional arguments that Policy § 275 violates the state's Equal Right Amendment and Equal Protection Clause have substantial merit. Inasmuch as this is an application for temporary injunction that requires a prompt determination, the court finds that it must pass on these tempting and very persuasive arguments made by the plaintiffs and limit its discussion to due process analysis.

16/ In this case, it is quite obvious the plaintiffs do not challenge the validity of the policy for fear of magnifying the defenses of failure to exhaust administrative remedies and sovereign immunity. In regard to the exhaustion of remedies, that argument is adequately answered in Sec. III (b) of this memorandum of decision; the administrative remedy is not adequate. freedom of procreative choice which encompasses the right to terminate a pregnancy. They further contend that she has a constitutional right to protect and preserve her health. The plaintiffs argue that the Policy § 275 which prohibits payment for medically necessary abortions for those entitled to Medicaid cannot pass constitutional muster because (1) it impairs a woman's right to privacy and right to protect and preserve her health in violation of the state's Due Process Clause; (2) it is sex-based discrimination in violation of the state's Equal Rights Amendment; and (3) it discriminates in violation of the state's Equal Protection Clause. For the purposes of this application for temporary injunction, the court need only discuss the first groun of impairment of a fundamental right in violation of the Due Process Clause.

* * * * * * *

***Moe* v. *Secretary of Administration*, 417 N.E. 2d 387 (Mass. 1980)**

* * * * * * *

III. *Constitutional claims.* The plaintiffs mount a broad attack on the restriction of Medicaid funding for abortions to cases in which the procedure is necessary to prevent a woman's death. First, they argue that this form of restriction is an impermissible burden on the exercise of a fundamental right secured by the guarantee of due process implicit in art. 10 of our Declaration of Rights. In addition, they argue that the classification established by this legislation cannot survive the equal protection analysis articulated in *Marcoux* v. *Attorney Gen.*, 375 Mass. 63, 375 N.E.2d 688 (1978), and that this restriction discriminates on the basis of sex in violation of the State Equal Rights Amendment. Finally, the plaintiffs argue that this restriction does not meet even the traditional minimum rationality standard of equal protection.

Because we agree that the challenged restriction impermissibly burdens a right protected by our constitutional guarantee of due process, we do not reach the alternative grounds of invalidity asserted by the plaintiffs. Although the issue involved is difficult and of extraordinary importance the framework for our analysis is well established. We begin by sketching the contours of the right asserted. We then inquire whether the challenged restriction burdens that right. Concluding that it does, we examine the justifications offered by the State in support these enactments.

[August 1980 Docket (newsletter of the Civil Liberties Union of Massachusetts)]

FROM THE EXECUTIVE DIRECTOR'S DESK

The legal struggle to protect the Constitutional right of a pregnant woman to decide whether she will bear a child or seek an abortion has taken a turn for the worse, especially for poor women. The United States Supreme Court, in *Harris* v. *McRae*, restricted the availability of Medicaid abortion services by holding that Title XIX of the Social Security Act does not obligate states to fund all medically necessary procedures when federal reimbursement is not available. The Court also ruled that the Hyde Amendment, restricting federal funds for abortion, does not violate either the Fifth Amendment's due process clause or the First Amendment's establishment of religion clause.

That decision opened the door for Massachusetts to stop paying for medically necessary abortions. (It had been forced to pay for them heretofore because of an injunction obtained in CLUM's lawsuit Preterm v. King, and held by a nationwide injunction in McRae). In light of the McRae defeat, the Preterm case was dismissed in the Federal District Court for Eastern Massachusetts by Judge Caffrey.

Undaunted by defeat at the federal level, CLUM filed a new suit, *Moe* v. *King*, in the Massachusetts Supreme Judicial Court on July 9, 1980, seeking to prevent implementation of the state law which would allow public money to be paid for abortions only if the life of the mother were endangered by the pregnancy.

In *Moe* v. *King*, CLUM argues that abortion is a medical procedure unique to women, that virtually all medicially necessary procedures unique to men are available, and in fact that no restrictions of this type are made on any other medically necessary procedure funded by Medicaid, so that to single out abortion for limitation constitutes sex discrimination in violation of both the equal protection clause of the State constitution and its Equal Rights Amendment.

The suit is brought on behalf of three Medicaid eligible women who desire abortions and cannot pay for them, and Dr. Phillip Stubblefield, who represents physicians and other medicaid providers.

If successful, the suit would force the state to treat abortion as it does all other medical services funded by Medicaid. Full reimbursement would have to be provided for all eligible women.

The state Equal Rights Amendment provides a legal argument that was unavailable to us or anyone at the federal level. The national Equal Rights Amendment is in deep trouble, still three states short of the needed number to gain passage. Because a strong coalition is being forged between the anti-ERA coalition and the anti-abortion people, it was our hope to be able to save Medicaid payments for medically necessary abortions through the federal court route without having to use the state Equal Rights Amendment and possibly fuel the national anti-ERA movement. But the loss in McRae was the last straw. We now have no recourse but to turn to the State Constitution for the legal tools to save Medicaid funding for abortions.

The first victory in the State suit came on July 23, 1980 whereof Judge Benjamin Kaplan issued an order restraining, for the time being, the cut off of payment for

Medicaid abortions by the State of Massachusetts. The hearing before the full bench of the Supreme Judicial Court is set for September 8, 1980.

Even if successful, the battle will not be over. Abortion opponents may try to amend the State Constitution to restrict abortion rights. Ultimately the right to choose will not be won or lost in the Courts: It will be won or lost on the policital front . . . a front where the anti-abortion people are now prevailing. On this issue, law suits can buy time, but precious little else.

1st CIRCUIT COURT
STATE OF HAWAII
FILED

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S. IKEDA
CLERK

June 6, 1978 - 9:30

EDWARD C. KEMPER 893-0
KEMPER & WATTS
1106 Castle & Cooke Building
130 Merchant Street
Honolulu, Hawaii 96813
Tel. No. 524-0330

Of Counsel:
JUDITH LEVIN
AMERICAN CILVIL LIBERTIES
UNION FOUNDATION
Reproductive Freedom Project
22 East 40th Street
New York, New York 10016
Tel. No. (212)725-1222

Attorneys for Applicants
for Intervention

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HAWAII RIGHT TO LIFE, INC., a Hawaii corporation, et al.

Plaintiffs,

vs.

ANDREW I. T. CHANG, in his capacity as Director, Department of Social Services & Housing, State of Hawaii, et al.,

Defendants.

CIV. NO. 53567

MOTION TO INTERVENE; MEMORANDUM IN SUPPORT OF MOTION; AFFIDAVIT OF JOHN SPANGLER; AFFIDAVIT OF GEORGE GOTO; EXHIBIT "A"; NOTICE OF MOTION

MOTION TO INTERVENE

Applicants for intervention, George Goto, M. D., and John Spangler, M. D., hereby move to intervene in all proceedings in this case. This motion is based upon Rule 24 of the Hawaii Rules of Civil Procedure, the attached affidavits and memorandum of law, and the files and records herein.

DATED: Honolulu, Hawaii, May 1, 1978.

EDWARD C. KEMPER
Attorney for Applicants

(Certificate of Service attached)

EXHIBIT "B"

* * * * * * *

Applicants' first claim to reimbursement as a matter of right rests on the Hawaii Constitution's guarantees of due process and equal protection and Article I, Sec. 21 which provides that "equality of rights under the law shall not be denied or abridged by the State on account of sex." Abortion is a medical procedure performed only for women; withdrawing funding for abortions while continuing to reimburse other medical procedures sought by both sexes or only by men would be tantamount to a denial of equal rights on account of sex.

* * * * * * *

National Right to Life
FACTSHEET

PUBLISHED BY THE LEGISLATIVE OFFICE OF THE NATIONAL RIGHT TO LIFE COMMITTEE
419 7th Street, N.W., Suite 402, Washington, D.C. 20004 (202) 638-7936

The E.R.A./Abortion Link and How It Can Be Broken

By Douglas Johnson
NRLC Legislative Director

• What is the Equal Rights Amendment?

The Equal Rights Amendment (ERA) is a proposed amendment to the U.S. Constitution. Like any constitutional amendment, it requires approval by a two-thirds vote of each house of Congress and then ratification by 38 state legislatures.

Congress originally approved ERA in 1972, but by 1982 it had legally expired without winning approval by the required number of states. Congress is now considering passing again the same wording: *"Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. The Congress shall have the power of enforce, by appropriate legislation, the provisions of this article."*

The Supreme Court has already ruled that sex-based legislative distinctions are invalid unless they are substantially related to important governmental objectives. Many forms of sex discrimination (such as unequal pay for equal work) have been prohibited by Congress. But ERA advocates say that ERA is needed in order to make legal sex discrimination completely constitutionally impermissible.

• What does ERA have to do with abortion?

There is strong evidence that ERA, as currently worded, would invalidate federal and state laws restricting funding of elective abortion. In addition, ERA could jeopardize other abortion-related laws.

ERA may also make it less likely that the Supreme Court will overturn its past rulings legalizing abortion on demand.

• How can these pro-abortion effects be prevented?

The only dependable way to prevent the ERA from being used as a pro-abortion tool is to add the "abortion-neutralization amendment" (also known as the Sensenbrenner Amendment) to ERA. The amendment reads simply: *"Nothing in this Article [the ERA] shall be construed to grant or secure any right relating to abortion or the funding thereof."*

In supporting the abortion-neutralization amendment to ERA, prolife groups are *not* attempting to "mix two separate issues," as some claim. As demonstrated below, ERA and abortion are *already* legally linked. The abortion-neutralization amendment is intended to *separate* ERA and abortion.

If the abortion-neutralization amendment is adopted, NRLC will thereafter be neutral on ERA. [For a more extended discussion of NRLC's position on ERA, see "NRLC and ERA: the 'Single-Issue' Approach," Dec. 15 *NRL News*.]

• How have major feminist organizations responded to this proposal to separate ERA and abortion?

Major feminist groups have vehemently rejected the abortion-neutralization amendment. *In fact, they have indicated that they will make sure that ERA dies in Congress rather than accept ERA with the abortion-neutralization amendment attached.*

For example, Judy Goldsmith, president of the National Organization for Women (N.O.W.), said, "We will support nothing but a clean [unamended] ERA. No true supporter of equality will support any other amendment" [*Philadelphia Inquirer*, Dec. 3, 1983]. A resolution adopted in October, 1983 at the national N.O.W. conference and sent to every member of Congress said, "N.O.W. serves notice on Congress that we will accept no amendments to the ERA and that any sponsor willing to accept amendments should *remove* her or his name from the list of sponsors."

N.O.W. is trying to sell ERA to the public as a simple economic equity measure—but N.O.W. will *kill* ERA if a simple "abortion-neutralization amendment" is attached. Doesn't this suggest that abortion funding is more important to N.O.W. than economic equity?

• What organizations are supporting the abortion-neutralization amendment (Sensenbrenner Amendment) to ERA?

Besides NRLC, the abortion-neutralization amendment is supported by the Christian Action Council, the National Association of Evangelicals, the United States Catholic Conference, the National Committee for a Human

Life Amendment, Eagle Forum, the American Life Lobby, and other groups.

• But I received a letter from my congressman, in which he said that the Supreme Court has always dealt with abortion in terms of the "right to privacy," and never as a matter of "sex discrimination." He said that the Supreme Court ruled in 1980 that the Hyde Amendment does not violate the "right to privacy," and he said ERA will not change this. I'm confused!

Perhaps the congressman is confused, as well. He may not yet understand the real legal grounds for prolife fears regarding ERA. On the other hand, he (or an aide) may be deliberately employing a "red herring" argument.

Let's review a few points of constitutional law. The Constitution guarantees "due process of law" (the Due Process Clause). In its 1973 *Roe v. Wade* decision, the U.S. Supreme Court proclaimed that "due process of law" includes a "right to privacy," which contains the "right" of a woman to have an abortion free from governmental interference. However, in its 1980 decision in *McRae v. Harris*, the Supreme Court said that this "right" was not so broad as to require that the government *pay for* an indigent woman's abortion.

ERA would have no direct effect *on this part* of the *McRae* decision. In other words, "the right to privacy" does *not* require the government to pay for abortions— with or without ERA.

So much for the Due Process Clause. But the Supreme Court also dealt with a *second* pro-abortion argument in *McRae* (and *this* is where the problems arise with respect to ERA). Pro-abortion groups urged the Court to rule that the Hyde Amendment violated a different constitutional provision guaranteeing "equal protection of the laws" (the Equal Protection Clause), because the Hyde Amendment denied funding for a specific "medical procedure" (abortion) sought by a particular *class* of people (poor women), while allowing funding of other medical services sought by other classes of people.

If the Court had accepted this argument, then the Hyde Amendment (and all similar state laws) would have been invalidated— even though the Court had already decided that the "right to privacy" did *not* include a right to a government-funded abortion. That's because a law is unconstitutional if it violates even one provision of the Constitution.

Sound confusing? Here's an illustration: People have a constitutional right to go to the movies without governmental interference, but the government is not obligated to pay for the tickets. *If*, however, the government decides to establish a ticket-buying program, then under the Equal Protection Clause the program must be administered in a way that does not discriminate on the basis of race, religion, or national origin. It would violate the Equal Protection Clause to pay for tickets for whites but not for blacks, for example.

In *McRae*, a closely divided (5-4) Supreme Court ruled that the Hyde Amendment did *not* violate the Equal Protection Clause— but only because the Hyde Amendment did not discriminate against any of the "suspect classes" currently recognized under the Constitution. The "suspect classifications" currently recognized are *race*, *religion*, and *national origin*. Laws based on these classifications are automatically subjected to what is known as "strict judicial scrutiny"— *and laws subjected to strict judicial scrutiny are virtually always invalidated*.

Women are *not* currently regarded as a "suspect class." Thus, in *McRae* the Supreme Court did not invoke the legally lethal "strict scrutiny." But ERA would *make* women a "suspect class." ERA's leading congressional proponents and pro-ERA legal scholars agree that this is the primary legal *purpose* of ERA.

Therefore, under ERA, laws which make distinctions between men and women would be subjected to "strict judicial scrutiny" and would be almost impossible to sustain in the courts— as is now the case with racially discriminatory laws. In fact, some prominent pro-ERA legal scholars believe that under ERA the constitutional prohibition against "sex discrimination" would be even more absolute than the prohibition against racial discrimination.

It simply begs the question for anyone to suggest that because the Supreme Court has not declared the Hyde Amendment to be a form of unconstitutional "sex discrimination" in the past, the Court will not so declare under ERA. *Past Supreme Court decisions were based on the existing Constitution— without ERA.*

• What legal authorities agree with this analysis?

The abortion-ERA connection is recognized by many of the nation's leading experts on abortion-related constitutional law. *What follows is a partial list of the legal experts who are on record as believing that ERA, as currently worded, would likely invalidate state and federal restrictions on abortion funding*:

Prof. Victor Rosenblum, Northwestern University Law School; Prof. John Noonan, Jr., University of California-Berkeley Law School; Prof. William F. Harvey, Indiana University Law School (dean, 1973-79); Prof. Henry Karlson, Indiana University Law School; Prof. Grover Rees III, University of Texas Law School; Prof. Joseph Witherspoon, University of Texas Law School;

Prof. Basile Uddo, Loyola University Law School (New Orleans); Prof. Lynn Wardle, Brigham Young University Law School; Prof. Charles Rice, Notre Dame Law School; Prof. Jules Gerard, Washington University Law School (St. Louis); Prof. Robert Destro, Catholic University of America Law School; Prof. William Stanmeyer, Delaware Law School; Prof. John Baker, Louisiana State University Law School; Prof. Hadley Arkes, Amherst College; Prof. William Valente, Villanova University Law School; Prof. Joseph Dellapenna; Villanova University Law School;

Prof. Gerald Dunne, St. Louis University Law School, Prof. Richard Stith, Valparaiso University Law School; Prof. David Granfield, Catholic University of America Law School; Prof. John Dunsford, St. Louis University Law School; Prof. John Potts, Valparaiso University Law School; Prof. Raymond Marcin, Catholic University of America Law School; Prof. David Forte, Cleveland State University;

William B. Ball, Esq., Ball & Skelly, Harrisburg, Penn.; Paige Comstock Cunningham, Esq., executive director, Americans United for Life Legal Defense Fund; and James Bopp, Jr., Esq., general counsel, NRLC.

In addition, one of the nation's most distinguished constitutional scholars, Prof. Paul Freund of Harvard Law School, said in February, 1983, that a proposed Minnesota ERA "could have an effect on abortion funding by the state as reinforcing an equal protection argument" against funding restrictions.

We must also look to the experience of a number of states which have added ERAs to their *state* constitutions. Already, lawyers associated with the American Civil Liberties Union (ACLU) have urged courts in four states (Hawaii, Massachusetts, Connecticut, and Pennsylvania) to rule that the ERAs which are in effect in those states require public funding of elective abortions.

Typical of these cases is *Fischer v. Commonwealth of Pennsylvania*, which goes to trial in February. In that case, Prof. Seth F. Kreimer and Prof. Virginia Kerr of the University of Pennsylvania Law School, Kathryn Kolbert of the Women's Law Project, and Thomas Harvey of the American Civil Liberties Foundation of Pennsylvania, have filed a petition in the Commonwealth Court which argues that because pregnancy is "unique to women," the Pennsylvania law restricting abortion funding "discriminates against women recipients because of their sex" and therefore is "a gender-based classification in violation of the Pennsylvania Equal Rights Amendment."

• Have state courts accepted the ERA-abortion argument?

So far, no state court has used a state ERA to mandate abortion funding-- but neither has any court yet *rejected* the argument.

In 1978, Hawaii Right to Life went to court to try to stop state funding of abortion. Two abortionists, aided by ACLU attorneys, defended the state funding policy, arguing that "withdrawing funding for abortions while continuing to reimburse other medical procedures sought by both sexes or only by men would be tantamount to a denial of equal rights on account of sex," and thus a violation of the Hawaii ERA. However, the court upheld the state policy on statutory grounds, and thus did not reach the ERA issue.

In the 1980 case of *Moe v. King*, the Massachusetts affiliate of ACLU urged that state's supreme court to rule that the state law restricting abortion funding violated several provisions of the state constitution, including the ERA. The court struck down the anti-funding law on the basis of the "due process" section of the state constitution, *and explicitly stated that it had not reached the ERA issue.*

ACLU-backed challenges to anti-funding laws in Pennsylvania (described above) and Connecticut are still in progress. The ERA-abortion issue is very much alive in those cases. During an early stage of the Connecticut proceeding, the judge issued an order in which he commented that the ACLU's ERA-abortion argument had "substantial merit" and that it was "tempting and very persuasive." The judge temporarily suspended the state anti-funding policy on other grounds, thus postponing his final judgment on the ERA question until a later stage in the proceedings (which has not yet been reached).

• Well, if some state court *does* reject the ERA-abortion argument, will that mean that prolife fears about the federal ERA are unfounded?

Not at all. No interpretation of a *state* ERA by a *state* court will control the interpretation of the *federal* ERA by the *federal* courts. As discussed above, the Supreme Court's 1980 *McRae* ruling strongly suggests that the federal ERA would invalidate *all* restrictions on abortion funding--state or federal-- regardless of what happens with the state ERAs.

• But how can it be "discriminatory," even under ERA, for the government to refuse to pay for abortions? After all, it's not the government's "fault" that only women can get pregnant!

Some ERA supporters have argued that ERA simply would not apply to laws which are based on a "unique physical characteristic" of one sex-- of which the Hyde Amendment would be an example. But this view does not square with the writings and public statements of some of ERA's principal proponents in Congress and in the academic community. For example, one of the foremost academic supporters of ERA, Prof. Ann Freedman of Rutgers Law School, testified before the House Civil and Constitutional Rights Subcommittee on Nov. 3, 1983, as follows:

"The ERA also requires strict scrutiny of classifications based on physical characteristics unique to one sex to assure that such classifications do not undermine the equality of the sexes. To treat people differently on account of characteristics unique to one sex is to treat them differently on account of their sex."

When the House Judiciary Committee took final action on ERA on Nov. 9, 1983, Rep. Don Edwards (D-Cal.)-- the chairman of the subcommittee which has jurisdiction over ERA-- confirmed on the record that ERA would require the application of "strict scrutiny" even to pregnancy-related laws. And as already explained, laws subjected to "strict scrutiny" by the courts are virtually always invalidated.

• In view of all this evidence, how can groups such as the National Organization for Women (N.O.W.) claim that abortion funding restrictions will *not* be regarded as a form of unconstitutional sex discrimination under ERA?

In claiming that ERA will not affect the Hyde Amendment, groups such as N.O.W. are implicitly contradicting arguments which they made against the Hyde Amendment before the Supreme Court in years past.

For example, in 1980 the American Association of University Women, N.O.W., and other pro-abortion groups filed a brief with the Supreme Court which contended that the Hyde Amendment should be declared unconstitutional because it adversely affected a "starkly defined-- 100% female and 100% poor -- class of individuals." In the same case, the National Women's Political Caucus said that the Hyde Amendment "severely impacts on poor women, depriving them of equal protection under the law."

In other words, these groups argued that the Hyde Amendment unconstitutionally discriminated against women *even without ERA*. Yet now they claim that ERA--which for the first time would make laws "discriminating" against women strictly impermissible-- would have *no effect* on abortion funding restrictions!

Lincoln C. Oliphant, a Washington attorney who has written extensively on the ERA-abortion connection, recently

wrote: "These pro-ERA groups have made one argument to the Supreme Court and are now making a contradictory argument to Congress—and they're telling Congress that it's silly for the prolife groups to make the argument that they themselves made to the Supreme Court! These groups are not being honest with Congress, with the press, or with the American people."

Clearly, groups such as N.O.W. are temporarily denying the ERA-abortion connection for political reasons. Pro-abortion groups have played this duplicitous game before. An instructive example occurred in Massachusetts, where the legislature was considering a state ERA in 1975. Some lawmakers were concerned about the ERA's possible impact on abortion law, but they were advised by one of the nation's leading constitutional authorities that "adoption of the amendment would have no effect whatever on the power of the state to regulate abortion or to protect fetuses consistent with Federal Constitution generally." The expert, Prof. Laurence Tribe of Harvard Law School, has worked closely at times with the American Civil Liberties Union (ACLU).

Partly on the basis of Prof. Tribe's assurance, the Massachusetts ERA was passed by the legislature and ratified by the electorate. A few years later, immediately after the U.S. Supreme Court upheld the constitutionality of the Hyde Amendment, the Civil Liberties Union of Massachusetts (CLUM), an ACLU affiliate, went to court to argue that the Massachusetts law barring funding of elective abortions violated the state ERA.

The executive director of CLUM explained the move in a revealing column which appeared in the August, 1980 issue of the CLUM newsletter, as follows:

"The state Equal Rights Amendment provides a legal argument that was unavailable to us or anyone at the federal level. The national Equal Rights Amendment is in deep trouble... Because a strong coalition is being forged between the anti-ERA coalition and the anti-abortion people, it was our hope to be able to save Medicaid payments for medically necessary abortions through the federal court route without having to use the state Equal Rights Amendment and possibly fuel the national anti-ERA movement. But the loss in McRae was the last straw. We now have no recourse but to turn to the State Constitution for the legal tools to save Medicaid funding for abortions."

• Aside from invalidating restrictions on abortion funding, what other pro-abortion effects might ERA have?

ERA would jeopardize *any* law which distinguishes between abortion and "sex-neutral" or male-only medical procedures. One important example would be the "conscience" laws which have been enacted by Congress and 44 states. These laws protect doctors and nurses from being penalized for refusing to cooperate in abortions. Currently, these laws are regarded as constitutional. But under ERA, such laws "would be treated like laws giving state officials the right to deny services to blacks but not to whites," in the opinion of Congressman Henry Hyde.

Furthermore, ERA could reinforce the "right to abortion" itself. That "right" is currently based only on a majority vote of the Supreme Court; it has no real foundation in the Constitution. Three sitting Supreme Court justices think that the Court's "right to abortion" doctrine should be overturned.

ERA could buttress the "right to abortion," however, by actually placing within the Constitution an alternative and less flimsy basis for a "right to abortion" (i.e., the sex discrimination approach). This might make a Supreme Court reversal of *Roe v. Wade* less likely.

In his book *A Lawyer Looks at the ERA* (1980), Prof. Rex Lee— now Solicitor General of the United States— wrote that "any chances for correction [of the Supreme Court's abortion decisions] would surely be destroyed by passage of the ERA, which would also seal the fate of the few remaining peripheral abortion questions, such as spousal and parental notification of the abortion decision and post-viability abortion regulation."

• Is there some way that ERA and abortion can be separated, without actually amending the text of ERA?

The only *dependable* way to prevent ERA from being used as a pro-abortion tool is to attach the abortion-neutralization amendment to ERA.

Some congressmen have suggested that the courts would honor a "legislative history" which indicated that Congress did not *intend* ERA to have pro-abortion effects. Such a "legislative history" would consist of statements by the House and Senate judiciary committees and by leading ERA sponsors that ERA was not intended to affect abortion law.

But in fact, ERA *cannot* be rendered "abortion neutral" just through legislative history. First, the federal courts have been known to ignore very explicit legislative history in order to achieve a desired policy result— and many federal judges strongly favor abortion funding. Second, courts need not even *consult* legislative history unless they decide that a legislative enactment is ambiguous on its face— but ERA is a sweeping, unequivocal, absolute constitutional decree which recognizes no exceptions.

Third, it is already clear that some of ERA's major congressional sponsors do not *desire* a clearly "abortion-neutral" ERA. When chief Senate ERA sponsor Paul Tsongas (D-Mass.) testified before the Senate Judiciary Committee's Constitution Subcommittee on May 26, 1983, Sen. Orrin Hatch asked Tsongas what effect ERA would have on the Hyde Amendment. Tsongas responded that "that issue would be resolved in the courts."

On Nov. 1, 1983, Hatch asked the same question of chief Republican ERA sponsor (and pro-abortion leader) Sen. Bob Packwood (R-Or.). Packwood said he doubted ERA would compel abortion funding, but that he could "guarantee that some suit will be brought [against the Hyde Amendment] on that basis," and that "I'm not sure how a court would come out on it." Packwood said he would fight the abortion-neutralization amendment to ERA.

Clearly, the burden of proof rests upon those who deny that ERA would have a pro-abortion impact. That is a burden which they cannot begin to meet. Therefore, the prolife movement must prevent ERA from becoming part of the U.S. Constitution, until and unless ERA is amended to be "abortion neutral."

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DOUGLAS JOHNSON
PAIGE COMSTOCK CUNNINGHAM

E.R.A. and Abortion: Really Separate Issues?

Many voters who would otherwise support an equal rights amendment fear that it could be used to undermine laws to restrict public funding for abortion. Several cases prove that these fears are well founded

Minutes after the 98th Congress convened for the first time on Jan. 25, 1983, House Speaker Thomas P. O'Neill Jr. announced to the assembled House that he was designating the proposed equal rights amendment (E.R.A.) as House Joint Resolution No. 1. The Speaker thereby emphasized that E.R.A. was a major legislative priority for the session. The conventional political wisdom was that it would easily pass the Democrat-controlled House but might run into trouble in the Republican-controlled Senate.

It did not work out that way. Instead, when E.R.A. came to the House floor on Nov. 15, it was defeated. The National Catholic Reporter subsequently published an analysis that began with a simple and accurate summary of what had occurred: "The abortion issue killed the equal rights amendment in a bitterly divided House of Representatives last week" (Nov. 25). The operative language of E.R.A. is brief. It reads: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this Article."

We believe that this proposal, unless revised, would invalidate restrictions on public funding of abortion, jeopardize the conscience rights of those who choose not to participate or cooperate in abortion and diminish prospects for a reversal of the 1973 Supreme Court decision that legalized abortion on demand. Such judgments are, to be sure, sharply disputed by many E.R.A. proponents, who contend that E.R.A. and abortion are unrelated. That position was defended at length by Elizabeth Alexander and Maureen Fiedler of Catholics Act for E.R.A. in "The Equal Rights Amendment and Abortion: Separate and Distinct," (Am. 4/12/80).

During the current Congressional session, speakers for pro-E.R.A. organizations have often publicly suggested that the purported E.R.A./abortion connection is a sham issue, raised by enemies of women's rights to defeat E.R.A.

For example, following its rejection by the House, Maureen Fiedler was quoted in the National Catholic Reporter as saying that E.R.A. would not affect abortion law. She said that an amendment to E.R.A. proposed by prolife groups to render E.R.A. neutral with respect to abortion was one of several "dishonest amendments proposed by people who want to kill the E.R.A." The Equal Rights Coalition of Utah said: "This attempt [to link the E.R.A. to abortion] is part of the disreputable propaganda technique known as the big lie."

In stark contrast, however, many E.R.A. proponents believe that abortion and E.R.A are related issues. Attorneys with the American Civil Liberties Union (A.C.L.U.) and other prochoice groups have already attacked laws restricting abortion funding in four states, arguing that such laws violate state equal rights amendments.

On March 9, the first court in the nation to address the issue accepted this argument. In a ruling that will have a significant effect on prospects for enactment of the Federal E.R.A., Judge John MacPhail of the Commonwealth Court of Pennsylvania, the court immediately below the Supreme Court, held that state laws limiting Medicaid funding of abortion to cases of rape, incest or life endangerment to the mother were invalid under the state E.R.A.: "Once the legislature has decided to grant finan-

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«Douglas Johnson is legislative director for the Right to Life Committee, Washington, D.C. Paige Comstock Cunningham *is executive director and general counsel for the Americans United for Life Legal Defense Fund, the legal arm of the prolife movement.»*

673

cal assistance to the medically needy, it cannot exclude persons from that grant on the basis of sex." He said that the laws also violated the state constitutional guarantee of "equal protection" under law, but that the equal-rights abortion argument "is meritorious and sufficient in and of itself to invalidate the statutes before us in that those statutes do unlawfully discriminate against women with respect to a physical condition unique to women" (Fischer v. Commonwealth of Pennsylvania).

This argument had been urged on the court by Planned Parenthood of Southeastern Pennsylvania, the Women's Law Project, the American Civil Liberties Foundation of Pennsylvania, law professors at Rutgers University and the University of Pennsylvania and others.

Lawyers with the A.C.L.U. had previously attacked antiabortion funding laws in Hawaii, Massachusetts and Connecticut on the basis of state equal rights amendments. In the Hawaii and Massachusetts cases (Hawaii Right to Life v. Chang and Moe v. King), the courts ruled in favor of abortion funding on other grounds and expressly stated that they had not touched the equal-rights/abortion issue. In no way did they reject the argument, as some E.R.A. proponents have subsequently claimed. In the Connecticut case (Doe v. Maher), the Superior Court has already commented that it finds the argument "substantial" and "very persuasive," but has not yet issued a final decision, which is expected by mid-1984.

If the Federal E.R.A. is enacted, will the Federal courts accept the argument put forward by the A.C.L.U. attorneys in these cases and accepted by the Pennsylvania court? Probably so, in the judgment of many legal experts who have considered the question. The Pennsylvania statute is very similar to the proposed Federal E.R.A.: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." Furthermore, U.S. Supreme Court precedents strongly suggest that the Federal E.R.A. would be applied in the same fashion.

Even before the Pennsylvania ruling, the National Right to Life Committee had compiled a list of 25 law professors (not counting those working with A.C.L.U.) who agree that the Federal courts would probably interpret E.R.A., as currently worded, to invalidate restrictions on state and Federal funding of abortion.

The list includes such respected prolife legal authorities as John T. Noonan Jr., of the University of California-Berkeley, Victor Rosenblum of Northwestern University, Basile Uddo of Loyola University (New Orleans), Grover Rees of the University of Texas and Robert Destro of The Catholic University of America.

In considering the possible impact of E.R.A. on abortion law, it is important to keep in mind the prevalence of a proabortion mindset in the Federal courts. As recently as last June, the U.S. Supreme Court invalidated a law requiring a 24-hour waiting period prior to an elective abortion and other minor forms of abortion regulation. Generally, the lower Federal courts have been even more hostile to impediments to abortion. These courts will not take lightly arguments such as those made by the A.C.L.U. in the cases described.

E.R.A.'s clearest impact would be in the area of abortion funding. Currently, the Hyde Amendment prohibits Federal Medicaid funding of abortion except when the mother's life is endangered, and about 30 states substantially restrict funding as well.

In its 1973 decision in Roe v. Wade, the Supreme Court ruled that the Constitution's guarantee of "due process of law" contains an implicit "right to privacy," which includes the "right" of a woman to have an abortion free from government interference. However, in its 1980 rulings in Harris v. McRae and Williams v. Zbaraz (both decided by narrow 5-4 margins), the Court held that this "right to abortion" was not so broad as to require that the government pay for an indigent woman's abortion. The E.R.A. would have no apparent effect on this holding. In other words, the "right to privacy" does not require tax funding of abortion, with or without E.R.A.

However, the Court also dealt with a second issue in McRae, and at this point E.R.A. becomes highly relevant. The prochoice plaintiffs urged the Court to rule that Congress had violated the constitutional guarantee of "equal protection of the laws" by funding most medical procedures through Medicaid, but denying funding for a specific "medical procedure" sought by a particular class of persons, in this case, indigent women. By a 5-4 vote, the Court rejected this argument, but only because the majority concluded that the Hyde Amendment "is not predicated on a constitutionally suspect classification."

E.R.A. proponents believe that the Court's current standard affords women inadequate protection'

The term "suspect classification" is a legal term of art. Under the current Constitution, legislative classification based on race and national origin are regarded as "suspect." Such classifications are automatically subjected to what is termed "strict judicial scrutiny," which means that they are presumed to be unconstitutional. Under E.R.A., the same would be true of classifications based on sex.

Laws subjected to "strict scrutiny" are, virtually without exception, invalidated. The last time the Supreme Court clearly decided that a legislative enactment discriminated on the basis of a "suspect classification," but nevertheless upheld the law, was in a 1944 ruling allowing the Federal

Government to place Japanese-Americans in special camps, a case now almost universally regarded as having been wrongly decided (Korematsu v. U.S.).

In decisions handed down during the past decade, the Supreme Court has made it clear that even without E.R.A. it regards sex-based laws as unconstitutional unless the government can demonstrate that they are substantially related to important government objectives. However, the Court has not deemed sex-based classifications to be "suspect"—or presumptively unconstitutional—as is the case with classifications based on race or national origin.

E.R.A. proponents believe that the Court's current standard affords women inadequate protection against invidious sex discrimination. They contend that full legal equality can only be achieved if the U.S. Constitution is amended to bar discrimination based on sex as strictly as it now bars discrimination based on race. But if E.R.A. would make sex-based laws constitutionally "suspect," then E.R.A. yanks the legal rug out from under the Hyde Amendment and similar state laws. As noted, the Supreme Court held that restrictions on abortion funding were constitutionally permissible because they did not disadvantage a "suspect" class—which would no longer be true under E.R.A.

Prominent E.R.A. proponents in Congress and in the legal community readily admit that, under E.R.A., restrictions on abortion and abortion funding would be subject to "strict scrutiny." This was confirmed, for example, by Ann E. Freedman of Rutgers Law School in New Jersey, who was the consensus choice of pro-E.R.A. advocacy organizations to represent their viewpoint in testimony before the U.S. Senate Judiciary Committee's Subcommittee on the Constitution on Jan. 24.

'Some E.R.A. proponents have argued that abortion-related laws should not fall within the scope of E.R.A.'

According to Professor Freedman, under E.R.A. any law that makes an explicit classification on the basis of sex would be unconstitutional on its face. Legislative classifications that are facially neutral but that have a disparate impact on one sex over the other, or that are based on a "unique physical characteristic" of one sex (such as classifications involving pregnancy and abortion), will be subject to "strict scrutiny," she said. Under questioning from subcommittee chairman Senator Orrin Hatch (R., Utah), Professor Freedman conceded that the strict scrutiny standard is "strict in form, fatal in fact."

The questioning pursued this point. Since strict scrutiny is "fatal in fact," would not E.R.A. invalidate restrictions on abortion funding? No, responded Professor Freedman: "E.R.A. will not have a practical impact on judicial decision-making concerning abortion rights because of the Supreme Court's well-demonstrated commitment to an alternative form of constitutional analysis, the constitutional right to privacy."

Professor Freedman explained that the Supreme Court could have ruled that the Hyde Amendment violated the right to privacy, but it did not. If the Court wished to reach the opposite result in the future, it would not need E.R.A., because it could reverse its application of the right to privacy. Hence, E.R.A. would have no practical effect on the Hyde Amendment. During questioning by Senator Hatch, Professor Freedman clung to the qualifier "practical," which another law professor termed "a weasel word."

Clearly, it begs the question to assert that E.R.A. will not affect abortion law merely because the Supreme Court declined—by a single vote—to compel abortion funding under the current Constitution. In reality, Professor Freedman merely offered dubious speculations on the policy preferences of the current Supreme Court justices, rather than providing a genuine legal analysis of how E.R.A. would apply to abortion issues.

Thomas I. Emerson of Yale Law School—sometimes referred to as "the father of the E.R.A."—took a similarly evasive approach when he testified before the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights on Oct. 19, 1983. Professor Emerson said he thought that under E.R.A. the Supreme Court would continue to regard the right to privacy as the "simplest approach" to abortion and abortion-funding questions. Therefore, he said, the E.R.A./abortion issue was "a red herring."

Significantly, however, he added, "I wouldn't say that if I were an attorney attempting to overthrow Harris v. McRae, that I wouldn't make that [E.R.A.] argument." But how can this be? Would the distinguished professor brandish "a red herring" before the Supreme Court? The Code of Professional Responsibilities of the American Bar Association forbids lawyers from raising claims that are "unwarranted by existing law" or not in "good faith." Professor Emerson cannot regard the E.R.A./abortion claim both as a good-faith argument and as "a red herring."

Some E.R.A proponents have argued that abortion-related laws should not fall within the scope of E.R.A. Since E.R.A. deals only with discrimination between men and women, and pregnancy is a "unique physical characteristic" of women, abortion-related laws are not sexually discriminatory, they assert. This argument was well summarized by Elizabeth Alexander and Maureen Fiedler in their 1980 AMERICA article, as follows: "Put in simplest terms, the equal rights amendment guarantees equal rights for men and women. Men can't get pregnant, can't have babies and can't have abortions. There is no way any E.R.A. can give, or deny, men an 'equal right' to abortion with women!"

However, this line of reasoning does not square well with the writing and testimony of some of E.R.A.'s leading proponents in Congress and in the academic community. In her testimony before the House subcommittee, for example, Professor Freedman stated flatly: "The E.R.A. also requires strict scrutiny of classifications based on physical characteristics unique to one sex to assure that such classifications do not undermine the equality of the sexes. To treat people differently on account of characteristics unique to one sex is to treat them differently on account of their sex." As already noted, laws subjected to strict judicial scrutiny are almost invariably declared unconstitutional.

Furthermore, the Supreme Court has rejected any "unique physical characteristics" exception in several recent cases involving Title VII of the Civil Rights Act, which prohibits discrimination "on the basis of sex" in employment. Under Title VII, an employer unlawfully discriminates if he treats a person "in a manner which but for that person's sex would be different," the Court has stated (L.A. Dept. of Water v. Manhart).

Such a "but for" standard means that legal "distinctions based on unique gender characteristics become paradigm cases of unlawful discrimination," John T. Noonan Jr. of the University of California-Berkeley Law School testified before the Senate subcommittee on Jan. 24. Professor Noonan is one of the nation's distinguished legal historians and a leading authority on constitutional law pertaining to abortion. (As discussed above, the Commonwealth Court applied the Pennsylvania E.R.A. in precisely the manner that Professor Noonan predicted. The court said that the Pennsylvania laws violated E.R.A. because they "discriminate against women with respect to a physical condition unique to women.")

Professor Noonan told the subcommittee that this principle would apply not only to restrictions on abortion funding, but also to all other government policies that treat abortion in a "discriminatory" manner.

Thus, E.R.A. would jeopardize, for example, the "conscience" laws that have been enacted by 44 states to date. These laws protect medical personnel and hospitals from being penalized for refusing involvement in abortion. Under E.R.A., such laws "would be treated like laws giving state officials the right to deny services to blacks but not to whites," in the view of Congressman Hyde.

Some E.R.A. proponents insist that the First Amendment alone would allow individuals and institutions to refuse to cooperate in abortion on religious grounds, E.R.A. or no E.R.A. But Professor Noonan reminded the Senate subcommittee that under E.R.A., sex discrimination would probably be treated like race discrimination, and that in the much-publicized Bob Jones University Supreme Court decision of 1983: "Government policy, carrying out a constitutional principle of nondiscrimination on account of race, outweighed religious liberty." If the same approach is taken under E.R.A., religious schools that impede abortion-related activities might find their tax exemptions in jeopardy, Professor Noonan said.

Besides expanding "abortion rights" in the ways described, Professor Noonan and other prolife legal scholars fear that E.R.A. could reinforce the court-created right to abortion itself and diminish chances for a Supreme Court reversal of Roe v. Wade. The Roe decision, it may be noted, has been severely criticized even by many legal scholars who favor legal abortion, because it so clearly lacks any real basis in the Constitution.

Last summer the Supreme Court reaffirmed Roe on a 6-3 vote, but Justice Sandra Day O'Connor, joined by Justice White and Justice Rehnquist, issued a carefully reasoned dissent, which in substance argued that Roe should be overturned. Such a reversal is a distinct possibility if more "strict constructionist" justices are appointed to the Court. Prospects for such a reversal may be lessened, however, if a concrete basis for a "right to abortion" (i.e., E.R.A.'s unqualified bar on sex discrimination) is placed within the Constitution. In his 1980 book *A Lawyer Looks at the E.R.A.*, Professor Rex Lee, now Solicitor General of the United States, went so far as to say that "any chance for correction [of Roe] would surely be destroyed by passage of the E.R.A."

Over a year ago, the National Right to Life Committee and other prolife groups proposed a simple means for definitively separating the E.R.A. and abortion issues: an amendment to the text of E.R.A., to read: "Nothing in this Article [the E.R.A.] shall be construed to grant or secure any right relating to abortion or the funding thereof."

'Pro-E.R.A. advocacy groups have vehemently rejected the abortion-neutralization amendment'

If adopted, this "abortion-neutralization amendment" would prevent E.R.A. from affecting abortion law in either direction. (It is sometimes referred to as the "Sensenbrenner Amendment" after its sponsor, Representative F. James Sensenbrenner [R., Wis.].) If this amendment were added to E.R.A., N.R.L.C. and the other national "single-issue" prolife groups would withdraw their opposition to E.R.A. Many prolife individuals would enthusiastically support an abortion-neutral E.R.A.

Nevertheless, pro-E.R.A. advocacy groups have vehemently rejected the abortion-neutralization amendment. At its convention last October, NOW (the National Organization for Women) unanimously adopted a belligerent resolution, later sent to every member of Congress, which read in part, "NOW serves notice on Congress that we will accept no amendments to E.R.A., and that any sponsor willing to accept amendments should remove her or his name from the list of sponsors." Furthermore, these groups and their Congressional allies repeatedly stated that they would scuttle E.R.A. themselves if any amendment were attached.

Despite such ultimatums, by late 1983 pro-E.R.A. lobbyists had concluded that the abortion-neutralization amendment would win majority support in the House. To prevent this, feminist organizations persuaded Speaker O'Neill to bring E.R.A. to the floor under an extraordinary shortcut procedure called "suspension of the rules." Under this procedure, debate would be limited to 40 minutes and no amendments would be permitted. They believed that E.R.A. would receive the necessary two-thirds vote under this "take-it-or-leave-it" approach. Prolife groups, denied any opportunity to revise E.R.A., had no choice but to lobby hard against the suspension motion. They were joined by the U.S. Catholic Conference (U.S.C.C.).

'Prolife organizations will continue to oppose passage of E.R.A. as currently worded'

Although the Catholic bishops had not taken a position on E.R.A. itself, U.S.C.C. had endorsed the abortion-neutralization amendment, and therefore opposed the shortcut procedure that precluded its consideration. The Eleanor Smeal Report later complained that Cardinal Joseph Bernardin—the just-appointed chairman of the bishops' Committee for Pro-Life Activities—had telephoned congressmen urging them to vote No.

In the face of such opposition, coupled with more general objections to Mr. O'Neill's attempted abuse of the legislative process, E.R.A. suffered an unexpected and politically damaging defeat. The vote was 278-147—six votes short of the necessary two-thirds majority. "The equal rights amendment isn't dead, but it won't survive many more such defeats," The New York Times commented.

Spokespersons for E.R.A. advocacy groups confidently predicted that they would round up six additional votes and pass E.R.A. in 1984. But instead they have lost ground in subsequent months, especially in the wake of the Fischer decision. In a significant development, the N.C.C.B. announced on April 19 that if the abortion-neutralization amendment is not added to E.R.A., N.C.C.B. "will have no alternative but to oppose E.R.A. because of the serious moral problems this will present."

Yet feminist leaders have refused to reconsider their "no revisions" stance. Indeed, any E.R.A. proponent who questions this policy risks sudden excommunication by the feminist leadership. For example, Representative Claudine Schneider (R., R.I.), a strong supporter of both E.R.A. and legal abortion, in December told a reporter that she was preparing a new version of E.R.A. "to make it more specific and clarify its intent, [so] we won't have the same extreme emotional controversy we have now."

NOW President Judy Goldsmith's response was immediate and forceful: "We will support nothing but a clean [unrevised] E.R.A. No true supporter of equality will support any other amendment" (Philadelphia Inquirer, Dec. 3, 1983).

E.R.A. proponents have yet to put forth any convincing reason why the abortion-neutralization amendment should not be adopted. Some have asserted that such a revision would "dilute the fundamental principle of equality," but obviously no "dilution" would occur unless E.R.A. in fact encompasses abortion rights.

Other E.R.A. advocates have argued that it is unnecessary to "clutter up" E.R.A. with an amendment because Congress can render the amendment "abortion-neutral" through "legislative history" (referring to the official record of the statements made by Congressional proponents of a measure during its consideration).

In fact, however, the courts need not even consult (much less defer to) legislative history unless they decide that an enactment is ambiguous on its face. Arguably, E.R.A. is not ambiguous. It expresses the "principle of equality" without exception or qualification. Thus, it is by no means certain that the courts would even delve into the specific intentions of the framers of E.R.A. regarding abortion.

In the Fischer case, not one line of the court's 32-page decision dealt with legislative intent regarding E.R.A.'s effect on abortion law. It is also generally recognized that when the Federal courts do choose to consult the legislative record, they often pick out those elements that support the result that they desire. As Judge Patricia Wald of the U.S. Court of Appeals of the District of Columbia put it in a 1982 speech: "Citing legislative history is . . . akin to looking out over a crowd and picking out your friends" (The Washington Post, Oct. 25, 1982).

If the courts examine the history surrounding the enactment of E.R.A., they will find a record that is equivocal. Within the past year alone, prochoice E.R.A. proponents have placed ambiguities into E.R.A.'s legislative record sufficient to serve the purposes of any future judge who wishes to reach a proabortion result, as several instances readily illustrate.

Representative Don Edwards (D., Calif.), chairman of the House subcommittee with jurisdiction over E.R.A., told the full Judiciary Committee that under E.R.A. "strict judicial scrutiny" would apply to any law based on a "unique physical characteristic" of one sex, such as pregnancy (Nov. 9, 1983). Although a committee report is generally a central element of the legislative history of any bill, no report on E.R.A. had been issued by the House Judiciary Committee when E.R.A.'s proponents brought E.R.A. to the House floor on Nov. 15. In fact, no committee report has been issued as of this writing.

When Senator Hatch asked chief Senate E.R.A. sponsor Senator Paul Tsongas (D., Mass.) what effect E.R.A. would have on the Hyde Amendment, Senator Tsongas responded that "that issue would be resolved in the courts" (May 26, 1983).

When Senator Hatch asked the same question of the chief Republican sponsor, Senator Bob Packwood (R., Ore.), who is also the leader of the prochoice forces in the Senate, Senator Packwood responded that he doubted E.R.A. would compel Congress to fund abortions, but that he could "guarantee that some suit will be brought [against the Hyde Amendment] on that basis," and that "I'm not sure how a court would come out on it." Senator Packwood said he would fight the abortion-neutralization amendment (Nov. 1, 1983).

In light of the above, prolife legal experts agree that the only dependable way to render the current E.R.A. "abortion-neutral" is to amend it. Prolife organizations will continue to oppose passage of E.R.A. as currently worded, probably defeating E.R.A., at least for the current Congress.

Even if E.R.A. passes as currently worded in a future Congress, ratification by 38 state legislatures is doubtful. The original E.R.A. fell short, even though it was ratified by 22 states before the Supreme Court legalized abortion on demand and by 12 more before tax funding of abortion became a major political issue. The legislatures of some of the ratifying states are now strongly antiabortion and are unlikely to ratify E.R.A. over prolife opposition.

An extraordinary level of political consensus is required for any constitutional amendment to become law. It is evident that no such political consensus will exist regarding E.R.A. so long as it is linked with abortion. If E.R.A. is really intended primarily as an "economic equity" measure, as NOW and other proponent groups say, then it is difficult to understand why they will not accept the abortion-neutralization amendment. It might not be too cynical to suggest that some feminist leaders, and some politicians, may really prefer to have E.R.A. stalled in Congress during this election year, thereby enhancing its usefulness as a "gender gap" issue and as a focal point for political fund-raising efforts.

Prolife organizations have proposed, in good faith, a means for definitely separating E.R.A. and abortion. Pro-E.R.A. groups have an ideal opportunity to remove a major obstacle to enactment of E.R.A. The burden is now on E.R.A.'s proponents to justify their refusal to do so. ■

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Honorable Jake Garn
United States Senate
Washington, D.C. 20510

Dear Senator Garn:

The Pennsylvania "E.R.A.-abortion case," Fischer v. Dept. of Public Welfare, attracted a good deal of attention last year when a state judge held that Pennsylvania's E.R.A. made the state's "Hyde Amendment" unconstitutional. That particular holding has now been reversed. Because of your interest in this issue, and in this particular case, and because of counsel on this issue that I have given you in the past, I believe it is now important to reassess the situation.

BACKGROUND: Joanne Fischer, and others, challenged the constitutionality of Pennsylvania statutes that restrict the circumstances in which the state will pay for an indigent women's abortion. The laws were said to impermissibly infringe on rights of personal privacy guaranteed under both state and federal constitutions and to violate the equal protection clauses and the Equal Rights Amendment of the Pennsylvania constitution.

The Pennsylvania E.R.A. reads in its entirety, "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." Penn. Const. art. I, sec. 28. Section 1 of the proposed Equal Rights Amendment to the Constitution of the United States reads in its entirety, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." See, e.g., S.J.Res. 10, 99th Cong., 1st Sess. (1985). Advocates and interpreters of the Pennsylvania provision are urging an interpretation of the state guarantee that is in conformity with the federal proposal (and there is state precedent to that effect).

CHANCELLOR'S OPINION: On March 9, 1984, Judge John A. MacPhail, acting as chancellor, declared the abortion funding statutes unconstitutional and prohibited their enforcement. He found, inter alia, that the statutes violated the Pennsylvania Equal Rights Amendment. In concluding his discussion of the state E.R.A., Judge MacPhail wrote,

> "We are of the opinion that while Petitioners' argument under the ERA is not as strong as their equal protection argument, it is meritorious and sufficient in and of itself to invalidate the statutes before us in that those statutes do unlawfully discriminate against women with respect to a physical condition unique to women."

Fischer v. Dept. of Public Welfare, 482 A.2d 1137, 1145 (Pa. Cmwlth 1984).

At the time of the decision, you, Senator Garn, said that Fischer "has provided another piece of evidence showing that ERA means abortion." 130 Cong. Rec. S 2660 (daily ed. March 13, 1984). You inserted into the Congressional Record the relevant parts of Judge MacPhail's opinion. You also pointed out that "the Commonwealth Court is not Pennsylvania's highest court, and

. . . [p]erhaps we have not heard the last of this case." Well, we have now heard of *Fischer* again, but have yet to hear the last of the case.

THE COMMONWEALTH COURT: The full Commonwealth Court, sitting to review the opinion of one of their own, Judge MacPhail, reversed him in part and sustained him in part. The full court held that the state Equal Rights Amendment does *not* compel the state to pay for abortions once it has undertaken to pay for other medically necessary services. Judges MacPhail and Craig dissented from this part of the Court's opinion.

Writing for the Court, Judge Crumlish said:

> "In the case *sub judice*, *indigent women* who choose to carry a fetus to term receive certain benefits which *indigent women* who choose to terminate their pregnancy do not. This simply is not actionable sex discrimination under the provisions of ERA.
>
> "This case does not involve a gender-based classification cognizable under the equal rights amendment. True, this statute has a basis in gender, for only women may choose to have an abortion or bear a child. But women are not being unfairly discriminated against because of their sex. 'The legislation is directed at abortion as a medical procedure, not at women as a class.' *Moe v. Sec. of Administration*, 382 Mass. 629, 417 N.E.2d 387, 407 (1982) (Hennessey, C.J., disssenting). The Commonwealth has chosen to further a legitimate state interest through the use of its funding power. We hold that the [abortion funding statutes] do not violate the provisions of the Pennsylvania equal rights amendment."

Fischer v. Commonwealth, 482 A.2d 1148, 1158-59 (1984).

THE STATE SUPREME COURT: *Fischer* is now on appeal to the Pennsylvania Supreme Court. Briefs have been filed, but no date has been set for oral argument. The meaning of the Pennsylvania Constitution will be finally determined by that court.

QUESTION PRESENTED: The chancellor held that Pennsylvania's Equal Rights Amendment constitutionally forbade state restrictions on funding indigents' abortions. The Commonwealth Court reversed. The question before us is this: Does the opinion of the Commonwealth Court erase the E.R.A.-abortion connection?

The ANSWER, in my judgment, is a firm "no."

ANALYSIS: Some will think it ironic to say that the Commonwealth Court did not erase the Pennsylvania E.R.A.-abortion connection. After all, the chancellor held that Pennsylvania's E.R.A. prohibited the state's funding restrictions and the Commonwealth Court *reversed* on that point. If one's analysis went no deeper than the courts' holdings, then my conclusion would appear not only ironic, but inconsistent with the evidence. However, once beyond a superficial reading of the opinions, one sees that the position of the Commonwealth Court does not erase the concern about an E.R.A.-abortion connection, it actually reinforces it. This is so because the reasoning of the Commonwealth Court -- whatever its merits may be for interpreting the Pennsylvania Constitution -- is the reverse of the reasoning that the federal Equal Rights Amendment will command.

For the Commonwealth Court, the state equal rights amendment was irrelevant because the statutes did not raise an issue of sex discrimination at all. According to the court's view, the statutes drew distinctions between indigent women who choose abortion and indigent women who choose birth. Women were not being discriminated against because of their sex, said the court, but because of their choice of a medical procedure. "This simply is not actionable sex discrimination under the provisions of [the state] ERA . . . [although] this statute has a basis in gender, for only women may choose to have an abortion or bear a child." Fischer v. Commonwealth, supra at 1159. The state Supreme Court may agree with this type of analysis, but it is not the type of analysis that the proponents of the federal E.R.A. expect from their own amendment.

The meaning of the proposed federal Equal Rights Amendment is not altogether clear. Sharp differences of opinion were presented in House and Senate hearings during the 98th Congress. There is, however, what I think can fairly be called the proponents' leading theory of the amendment. This theory was originally propounded in an article in the Yale law review and was adopted then, and is accepted now, by the leading Congressional proponents of the amendment.

The article is, Brown, Emerson, Falk, & Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 Yale L. Jn. 871 (1971). Leading Congressional proponents of the Equal Rights Amendment accepted the authority of the Yale article. See, e.g., 118 Cong. Rec. 9083 (1972) (remarks of Senators Bayh and Ervin). That the theory of the Yale article continues to be pre-eminent among proponents can be seen by the fact that Professors Emerson and Freedman were chosen by the amendment's proponents to represent the legal philosophy of the amendment to the House Judiciary Committee and that Professor Freedman was chosen by the amendment's proponents to testify to the Senate subcommittee on the relationship of E.R.A. and abortion. (She testified that E.R.A. would make "no practical difference" in the adjudication of abortion questions. Her claim is not believed by me, and not believed by the Pennsylvania plaintiffs who used her testimony to help them argue that E.R.A. forbids the state's Hyde-type amendment. The plaintiff's brief is discussed in greater detail below.)

The position of the Yale authors is that pregnancy classifications are based on unique physical characteristics that, while not absolutely forbidden under the Equal Rights Amendment, will under E.R.A. be submitted to strict judicial scrutiny and upheld only when justified by compelling state interests that are closely and narrowly related to the purposes of the statute. See, e.g. 80 Yale L. Jn., supra at 893-94. In her House testimony, Professor Freedman confirmed this interpretation:

> "The ERA also requires strict scrutiny of classifications based on physical characteristics unique to one sex to assure that such classifications do not undermine the equality of the sexes. To treat people differently on account of characteristics unique to one sex is to treat them differently on account of their sex. Although such classifications are not prohibited outright, because there are a limited number of circumstances in which their use is justified, the state would bear the burden of demonstrating that such classifications are necessary and the reasons for them compelling. The dissent of Justice Brennan in Geduldig v. Aiello, [417 U.S. 484 (1974)] illustrates the approach contemplated by the ERA. . . . The ERA would provide a constitutional foundation for the protection of women from governmental discrimination based on such stereotypes."

Statement of Ann E. Freedman before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Comm. at 5 (mimeo) (Nov. 3, 1983) (emphasis added).

The approach to statutory classifications based on unique physical characteristics that is anticipated by E.R.A.'s proponents is precisely contrary to the approach of the Pennsylvania Commonwealth Court. The federal E.R.A. will require statutes such as Pennsylvania's "Hyde Amendment" to withstand strict judicial scrutiny and to be justified by compelling state interests. The Commonwealth Court used no such searching inquiry and applied no such rigorous test. The federal E.R.A., applied as its leading proponents declare it must be, would produce a result opposite to that reached by the Pennsylvania intermediate court.

The judicial tests anticipated from E.R.A.'s passage, and the likely failure of the Hyde Amendment to meet those tests, are treated in more detail in my letter to you of November 14, 1983, reprinted at 129 Cong. Rec. S 16234-36 (daily ed. Nov. 15, 1983).

Professor Freedman told the House of Representatives that "The dissent of Justice Brennan in *Geduldig v. Aiello*, illustrates the approach contemplated by the ERA" in cases involving "classifications based on physical characteristics unique to one sex." As in Pennsylvania's *Fisher*, *Geduldig* raised the two important questions in sex discrimination cases: First, what level of equal protection scrutiny is appropriate (or required)? And second, which is really the threshhold question, is the legislative classification in fact a classification based on sex?

The difference between the majority and minority in both *Fischer v. Commonwealth* and *Geduldig v. Aiello* was not over question one. Question one was irrelevant to the majorities in both cases because they answered the threshhold question in the negative. In both cases, so far as the majorities were concerned, the legislative classifications simply were not sex-based.

How are we to decide what is and what is not a sex-based classification? The dissent of Justice Brennan in *Geduldig* "illustrates the approach contemplated by ERA" according to an important E.R.A. expert. That approach is the analytical opposite of the approach taken by the *Fischer* and *Geduldig* courts and will, when implemented, result in reversed results.

Reversing *Geduldig* is a widely popular idea, and reversal has, in fact, been effectively achieved by the Pregnancy Discrimination Act, Pub.L. 95-555, adding 42 U.S.C. 2000e(k) and Pub.L. 92-261, amending 42 U.S.C. 2000e(a) to include state and local governments. The Pregnancy Discrimination Act (in which Congress dealt explicitly with abortion) was Congress's response to *General Electric v. Gilbert*, 429 U.S. 125 (1976). *Gilbert* was to *Title VII* what *Geduldig* is to the Fourteenth Amendment. Therefore, while *Geduldig* continues as the "correct" interpretation of the Constitution, neither its result *nor its reasoning* remain viable within the Title VII context. *See, Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C*, -- U.S. --, 103 S. Ct. 2622, 2627 (1983).) But if reversing *Geduldig* is a popular idea, and reversing *General Electric v. Gilbert* is a fait accompli, reversing *Fischer v. Commonwealth* (or the federal Hyde Amendment case, *Harris v. McRae*, 448 U.S. 297 (1980), for that matter) is neither popular nor free of controversy. Many legislators, including a majority in Congress and in the Commonwealth of Pennsylvania, do not wish to pay equally, or to compel others to pay equally, for pregnancy-leading-to-birth and pregnancy-leading-to-abortion.

Justice Brennan's dissent in *Geduldig* shows the analysis that is to be employed under the federal E.R.A. for classifications based on unique physical characteristics:

> "Despite the [California disability and insurance program's] broad goals and scope of coverage, compensation is denied for disabilities suffered in connection with a 'normal' pregnancy -- disabilities suffered only by women. [Citation.] Disabilities caused by pregnancy, however, like other physically disabling conditions covered by the Code, require medical care, often include hospitalization, anesthesia and surgical procedures, and may involve genuine risk to life. Moreover, the economic effects caused by pregnancy-related disabilities are functionally indistinguishable from the effects caused by any other disability: wages are lost due to a physical inability to

> work, and medical expenses are incurred for the delivery of the child and for postpartum care. In my view, by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, hemophilia, and gout. In effect, one set of rules is applied to females and another to males. Such dissimiliar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination."

Geduldig v. Aiello, *supra* at 500-501 (Brennan, J., dissenting) (footnotes omitted). *Cf.* Brennan's analysis quoted here *with* the majority's position, *id* at 496 n.20.

If the test in Brennan's dissent were applied to the Pennsylvania statute, the statute would be found to discriminate on the basis of sex. This is the finding that the majority refused to make in *Fischer v. Commonwealth*. The Commonwealth Court focused on the medical decision being made by indigent women: Some choose birth; some abortion. Brennan would focus on the "double standard" for Medicaid compensation: Men "receive full compensation for all disabilities suffered" while "a limitation is imposed upon the disabilities for which women workers may recover." Brennan's approach "illustrates the approach contemplated by the ERA."

The inquiry does not end once a classification has been adjudged as sex-based, for sex-based classifications must be put to the constitutional test. My letter to you of November 14, 1983, *supra*, explains at some length my position that the Hyde Amendment will not be able to withstand the constitutional test imposed on it by the federal Equal Rights Amendment. The Pennsylvania courts will, of course, determine their own standard for their E.R.A.

I mentioned above that Ann Freedman, who now teaches at Rutgers Law School, testified that passage of the Equal Rights Amendment would *not* affect the constitutional law of abortion or of abortion funding. This was her testimony in both the Senate and the House. I think her conclusion is demonstrably wrong and I have attempted to show its wrongness. See, November 14, 1983, letter, *supra*. But I am not the only person who thinks Professor Freedman is wrong. In fact, Fischer's lawyers use Freedman's testimony to demonstrate that the E.R.A. forbids the Pennsylvania abortion funding restrictions.

Here is an excerpt from the plaintiffs' brief to the Pennsylvania Supreme Court:

> "More recent legislative history of the proposed federal ERA has continued to focus on the rigorous scrutiny that the ERA requires for classifications based on physical characteristics unique to one sex. Professor Ann E. Freedman, one of the authors of the [Yale] article, has stated at Congressional hearings on the ERA:
>
> > [Here the paragraph from Prof. Freedman's House testimony that I quote above on page 4 is given.]
>
> [Then, the brief continues:]
>
> "Proper ERA analysis requires then that the Commonwealth justify the classification drawn by this statute by a compelling state interest, a standard which it is clearly unable to meet. As Judge MacPhail found, neither the state['] s interest in the health of the woman nor the protection of fetal life is compelling:

"'*Roe v. Wade* also held that a state's interest in potential life may never outweigh the superior interest in the life and health of the mother; this is true even though the state has two separate and district (sic, should read "distinct") interests -- the health of the mother and the potentiality of human life.'

"Chancellor's Opinion p. 17.

"This was first explicitly established in *Roe v. Wade*, (citation) and more recently reaffirmed by the *United States Supreme Court* in *City of Akron v. Akron Center for Reproductive Health*, (citation)."

Brief of Appellants at 56-57, *Fischer v. Dept. of Public Welfare*, App. Doc. nos. 67 M.D. & 69 M.D., S. Ct. of Penn. (Nov. 28, 1984) (footnotes omitted).

This brief was signed by two attorneys of the Women's Law Project, a professor of law at the University of Pennsylvania, *and* a professor of law at Rutgers. An *amicus* brief was signed by another professor from Rutgers.

Professor Freedman has not persuaded her colleagues at Rutgers that E.R.A. does not mean abortion. Her colleagues take her testimony (in which she concludes that there is no "practical" "E.R.A.-abortion connection") and they reach exactly the opposite conclusion. So do I.

Sincerely,

Lincoln C. Oliphant,
Counsel

THE IMPACT OF THE EQUAL RIGHTS AMENDMENT: VETERANS PROGRAMS

TUESDAY, FEBRUARY 21, 1984

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:44 a.m., in room SD-406, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senator Thurmond.

Staff present: Stephen J. Markman, chief counsel; Randall Rader, general counsel; Carol Epps, chief clerk; Diane Franke, clerk; Robert Feidler, minority chief counsel; Richard Bowman, counsel; and Andrew DeMars, minority staff.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. We welcome you to our hearing this morning. Ladies and gentlemen, this marks the fifth day of hearings by the Subcommittee on the Constitution on the proposed equal rights constitutional amendment.

As with our previous hearings, the subcommittee today will consider the impact of the ERA upon a specific area of the law. The focus of the present hearing will be upon the ramifications of the equal rights amendment for veterans programs.

Today's hearings should contribute significantly to the overall legislative history that the subcommittee is attempting to establish. This series of hearings should ensure that legislators have a better understanding of what changes in public policy will be required by the ERA.

The relationship between the ERA and veterans' programs is one of the more controversial issues in this debate. The focus of this hearing is not on the wisdom of the veterans programs, especially veterans' preference programs, but on the constitutionality of such programs.

To help this panel better understand this issue, we are privileged to have an outstanding group of witnesses with us this morning.

Our first four witnesses will appear today together as a panel. They are highly knowledgeable on the issue before the committee today—two are proponents of the equal rights amendment and two are critical of the amendment.

Michael Meloy is a distinguished attorney from Helena, MT. He has recently been involved in highly publicized litigation challenging the constitutionality of the veterans' preference statute in Montana.

Gary McDowell is professor of government at Tulane University. He is also the director of the Center for the Study of the Constitution at Dickinson College.

Charles Shanor is professor and associate dean of the Law School of Emory University. Along with Mr. John H. Flemming, Dean Shanor was the author of an extremely important article on veterans preference cited by the Supreme Court in exploring the question of veterans' preference as gender discrimination.

Dean Phillips is a senior attorney at the Board of Veterans Appeals and served in the Carter administration as special assistant to the VA General Counsel. He earned the Silver Star, Purple Heart, and Bronze Star in Vietnam, and today is representing the Military Order of the Purple Heart.

Gentlemen, we are very happy to have you with us.

Senator Baucus regrets that he cannot be here this morning, but he has been unavoidably detained. He wanted to make sure you were appropriately welcomed, and I do welcome you. He is disappointed that he cannot be here to personally introduce his close friend, Mr. Meloy.

STATEMENTS OF MICHAEL MELOY, ATTORNEY AT LAW, HELENA, MT; PROF. GARY L. McDOWELL, TULANE UNIVERSITY; CHARLES A. SHANOR, DEAN, EMORY UNIVERSITY SCHOOL OF LAW; AND DEAN K. PHILLIPS, MILITARY ORDER OF THE PURPLE HEART

Mr. MELOY. Mr. Chairman, I am honored to have been invited to appear before this committee. My constituency is a client in Helena, MT, who is in the process of challenging the Montana veterans preference.

It occurred to me that if I could share with you some of the background by which the challenge arose, it might serve as a basis for the considerations this committee has with respect to the equal rights amendment. I should also say at the outset that although my expertise comes from litigation, I am philosophically in favor of the equal rights amendment and hope to point out why I think it is important.

My practice in Helena, MT, is limited entirely to trial work, and as I said, I am presently litigating the question of the Montana veterans preference at it is seen in light of the Montana equal rights amendment. There are some other complications that are present in that case, and I want to tell the committee about those, too.

First, Montana's veterans' preference was enacted in the mid-1920's and was treated until last year as a tie breaker. Should a veteran apply for a job in State government or local government—it applied across the board—they received a preference but that preference would only give them the job if everyone else were substantially equally qualified.

We had three agencies who applied a point preference and administered the preference a bit differently and the significance of that difference will become obvious as I go through my testimony.

In early 1983, the Montana Supreme Court looking at the language of the Montana statute decided that it was absolute: Construing, then the Montana statute for the various governmental bodies that had to hire under it the various employers were constrained to hire the veteran regardless of the qualifications of anyone else who might apply as long as everybody was at least minimally qualified for the job.

The second expansive provision of the Montana Veterans' Preference Act under the absolute ruling of the Supreme Court was that it also extended to spouses of veterans.

In 1983 then, the Montana Supreme Court had said this is an absolute preference and anyone who applies for a job with a veterans preference gets it. A person who was entitled to a veterans preference included anybody who served more than 180 days in the U.S. military regardless of whether it was a combat period was entitled to the preference, and anyone who served during combat years was also entitled to the preference regardless of how long they were in the military. They may have spent a day in the military and discharged for medical reasons and then were entitled to the preference.

Now, Susan English was a woman who fell in love with her college sweetheart and married him in her second year of college, and they began to have children. The husband went through college and graduated. She maintained the family home.

He, then, became interested in another woman. The individuals split up and she was stuck with a year's worth of college education and no way of supporting herself and her two children and was not receiving any support from her husband.

She went back to school. She worked part-time jobs. She bartended. She did everything she could to get through school, and she graduated from Carroll College, which is in Helena, MT, with a bachelor's degree and was entitled at that point to a teaching certificate which she got.

Unfortunately, the day she got her teaching certificate was the day that the decision from the Montana Supreme Court came down saying that veterans get the job. She applied in the spring, and none of the agencies were real sure how to handle the question of applications from people who did not have preferences.

By the time the hiring decisions had to be made in early September, none of the people who did not have a preference were entitled to an interview. Susan English did not even get an interview, and she applied for eight jobs in the Helena area.

One school district had five jobs available, and she applied to that school district, and there were five women who were married to veterans who had a preference and who got hired. She was angry and she was frustrated and she had spent 3½ years training herself to be a teacher and she could not get a job.

She came to me and I told her that I thought there was a basis for a challenge to the Montana veterans preference based upon two grounds essentially. One, that it violated the Montana equal rights amendment which is different from the Federal equal rights amendment that is being considered in this committee, in that the Montana equal rights amendment says no person may be discriminated against in the exercise of their civil and political rights on account of sex.

The Montana Supreme Court has not construed that provision and this was the first opportunity which they would have to deal with a facially neutral State statute.

Second, the most interesting, in some respects, argument that we raised in the case was with respect to marital status. I developed an argument which comes from the U.S. Supreme Court cases guaranteeing the right of freedom to marry as a fundamental right, and thus triggering heightened scrutiny, we have, I think, effectively eliminated the problem, as I will explain to you in a minute.

The case was very visible, as the Senator pointed out in his introduction. It came at the same time as challenges from veterans who were not afforded their preference, and the Susan English case along with several veterans cases were all publicized.

The significance of my case is that I put it together as quickly as I could. We established the facts. We knew what the facts would be with respect to plaintiff and the defendants and we also had developed some statistics with respect to the impact of the preference on hiring in State government.

In response I think primarily to the lawsuits, the governor called a special session of the Montana Legislature, heard testimony from Susan English, heard testimony from the various agencies and modified the veterans preference in December.

We now have a preference which extends only to the veteran unless he is unable to utilize it. He must use it within a 5-year period after his leaving the service, and it does not apply to the spouse of the veteran, and it is only a tie breaker; that is, if everyone is substantially equally qualified, the veteran gets the job.

Now, I am not sure, Mr. Chairman, how much detail you wish me to discuss with the committee with respect to the analysis.

Senator HATCH. I think you have covered it well. We would like all witnesses to summarize if they can, but I want to give you as much time as you need.

Mr. MELOY. Anticipating that I may have the opportunity to discuss the analysis in response to a question later, let me just leave with the committee this notion about what litigation in Montana has done.

The paucity of litigation of cases decided by the Montana Supreme Court, I think, is primarily a direct result of the passage of the equal rights amendment when the 1972 constitution was adopted.

In 1974 and in 1975, and I served in the Montana Legislature during that time period, we went through, in response to the equal rights amendment, all of Montana's statutes and essentially removed the kinds of facially discriminatory language.

Second, and I think perhaps most importantly, the Montana Legislature in December in special session in response to the pointing out to them of the kind of impact that was being felt in hiring in Montana responded favorably in accomplishing the goals of the veterans preference; that is, to help the veteran get readjusted, and at the same time, acknowledge the substantial impact that the preference had in hiring in Montana.

It seems to me that the equal rights amendment, if it were adopted by the various States would have the same kind of impact, not only on the legislatures but also on the legal system, and I think at that point men and women can be treated legally without difference.

Senator **Hatch**. Thank you.

We will go to Mr. Phillips at this point, and then to Mr. Shanor and finally Mr. McDowell.

STATEMENT OF DEAN K. PHILLIPS

Mr. **Phillips**. Thank you, Mr. Chairman.

It is an honor to represent the Military Order of the Purple Heart, chartered in 1958 by Congress to represent the interests of those Americans who sustained wounds while engaged in combat against our Nation's enemies.

I was initially elected national judge advocate at our national convention in 1982, some 15 years after I was wounded in Southeast Asia while on a long-range reconnaissance patrol near what was then known as war zone D.

The issue today is the impact of the ERA with respect to veterans' preference. We are aware that last September the president of the League of Women Voters advised Congress that the veterans' preference statute unsuccessfully challenged by the National Organization for Women and other feminist organizations in *Massachusetts* v. *Feeney* in 1979 would be stricken down as unconstitutional if the ERA were ratified.

We are also aware that last September the president of the National Organization for Women also advised Congress that without ERA it was often impossible to successfully pursue sex discrimination cases like *Feeney*. She concluded that "only by passage of the ERA will women finally secure full and unequivocal acknowledgement of their entitlement to legal equality."

I am aware that NOW was founded in 1966 and that article III of their bylaws mandated, and I quote, "direct action to bring women into full participation of society now, exercising all of the privileges and responsibilities thereof in truly equal partnership with men," end of quote. That was in 1966.

However, one area which NOW in particular and women's groups in general did not make a sincere effort to exercise responsibilities in truly equal partnership with men was service in the military during the Vietnam war. Accordingly, their subsequent bemoaning of the privileges earned by men and women who did serve such as veterans' preference has been less sympathetically received both by our organization and in many other quarters.

In 1966 I gladly gave up my student draft deferment, which was unfair to those men of my generation who were not inclined to attend college, to enlist in the U.S. Army paratroopers. Basic pay in those days for private E–1 was less than $97 monthly. Although it was not an overriding factor in my decision to enlist, I was also aware that earlier in 1966 Congress had enacted GI bill and veterans' preference legislation and that veterans' preference legislation could not be attacked under the Civil Rights Act and would extend to my widow if I were killed or 100 percent disabled.

As has been the case in most wars, many people were killed and maimed. Every member of my 26-member recon platoon was ultimately wounded at least once, and all but 5 of us were either killed or so badly wounded that medical evacuation to Japan was required.

In the *Feeney* case NOW was quoted as complaining that females' opportunities to enter the military had been restricted by quotas and higher enlistment requirements.

I am aware that between 1948 and 1967 Congress had limited the percentage of women in the Armed Forces to no more than 2 percent. However, any inference that women were beating down the doors of recruiting offices and draft boards demanding to exercise all the responsibilities of society in truly equal partnership with men is dispelled by a 1977 Office of the Secretary of Defense report entitled "Use of Women in the Military." That report observed, and I quote:

> With the advent of the Korean War, an unsuccessful effort was made to recruit some 100,000 women to meet the rapidly expanding manpower requirements. Young women just were not interested in serving, perhaps because of the unpopularity of the war at that time. Between 1948 and 1969, even including nurses, the percentage of women in the military never exceeded 1.5 percent and averaged 1.2 percent of the total active strength.

Congress lifted the 2-percent limit in 1967, but in point of fact, females did not reach 2 percent of the Armed Forces until more than 5 years later in 1973, after U.S. ground troops were pulled out of Vietnam.

During the decade of the Vietnam war, men repeatedly unsuccessfully pleaded before the courts that the male-only draft unfairly denied males the equal protection granted under the fifth amendment to the Constitution. Most women, of course, were content to enjoy the privilege of exemption from the draft and NOW and similar organizations did not join in such suits during the war, once again failing to bemoan exemption from the draft from either an equal employment opportunity or equal responsibility standpoint. Thus, the most blatantly sexist policy in our Nation's history, the limitation of the drafting of those who would die and be maimed in war remained limited exclusively to the male sex. By 1969 to 1970 draftees suffered more than 60 percent of U.S. Army casualties.

While NOW avoided facing up to those issues in the Vietnam war, that organization passed a welcome home resolution in 1971 which stated, and I quote, "The National Organization for Women opposes any State, Federal, county, or municipal employment law or program giving special preference to veterans." End of quote. NOW later confirmed in a letter to me dated July 29, 1979, that the resolution still represented their policy.

I have submitted a copy of that letter and other items for the record.

Senator HATCH. Without objection, they will go in the record at this point.

[The following was received for the record:]

NATIONAL ORGANIZATION FOR WOMEN, INC.,
July 29, 1979.

DEAN K. PHILLIPS,
1700 Sherwood Hall Lane,
Alexandria, VA

DEAR MR. PHILLIPS: I have received your letter asking whether the September, 1971 resolution concerning veteran's preference has been rescinded or modified.

The resolution has not been rescinded or modified and still represent's NOW's official position.

Sincerely,

PHYLIS G. WEST, *Legislative Aide.*

[From the Stars and Stripes—the National Tribune, Mar. 29, 1984]

ERA THREATENS ABSOLUTE VETERANS' PREFERENCE

(By Dean Phillips)

(Dean Phillips is National Judge Advocate, Military Order of the Purple Heart. He served with the 101st Airborne Div. in Vietnam 1967-1968 as an enlisted man and was awarded the Silver Star, 2 Bronze Stars, the Purple Heart and Combat Infantry Badge.

(Phillips currently serves in the Army Reserves as a Company Commander with the 11th Special Forces Group. He wrote a chapter on veterans preference in Strangers at Home: Vietnam Veterans Since the War (Praeger, 1980).)

It is an honor to represent the Military Order of the Purple Heart, chartered in 1958 by Congress to represent the interests of those Americans who sustained wounds while engaged in combat against our Nation's enemies.

The issue today is the impact the Equal Rights Amendment may have on veterans' preference.

We are aware that lst September representatives from The League of Women Voters and the National Organization for Women (NOW) advised Congress that in effect the ERA was necessary in order to stike down veterans preference which was upheld by the Supreme Court in *Feeney v. Massachusetts.*

NOW was founded in 1966 and Article III of their bylaws mandated "direct action to bring women into full participation of society now, execrising all the privileges and responsibilities thereof in truly equal partnership with men."

However, one area which NOW in particular and women's groups in general did not make a sincere effort to execrise "responsibilities in truly equal partnership with men" was service in the military during the Vietnam War.

Accordingly, their bemoaning of the privileges earned by men and women who did serve [such as veterans' preference in civil service] has been less sympatheitcally received in many quarters.

I am aware that between 1948 and 1967 Congress had limited the percentage of women in the Armed Forces to no more than two percent and there were more restrictive policies for females.

However, any inference that women were beating down the doors of recruiting offices and draft boards demanding to exercise all the responsibilities of socity in truly equal partnership with men is dispelled by a 1977 Office of the Secretary of Defense "Use of Women in the Military" Report which observed:

With the advent of the Korean War, an unsuccessful effort wa made to recruit some 100,000 women to meet the rapidly expanding manpower requirements.

Young women just were not interested in serving, perhaps because of the unpopularity of that war at the time.

Between 1948 and 1969, even including nurses, the percentage of women in the military never exceeded 1.5% and averaged 1.2 percent of the total active strength.

Congress lifted the 2% limit in 1967 but, in point of fact, females did not reach 2% of the Armed Forces until more than 5 years later in 1973, after U.S. ground troops were pulled out of Vietnam.

During the decade of the Vietnam War, men repeatedly and unsuccessfully pleaded that the male-only draft unfairly denied males the equal protection guaranteed under the Fifth Amendment to the constitution.

Most women, of course, were content to enjoy the privilege of exemption from the draft and NOW and similar organizations did not join men in such suits during the war—once again failing to bemoan exemption from the draft from either an equal employment opportunity or equal responsibility standpoint.

Thus, the most blatantly sexist policy in our Nation's history—the limitation of the drafting of those who would die and be mained in war remained limited exclusively to the male sex.

By 1969-1970 draftees suffered more than 60% of the U.S. Army casualties.

NOW passed a welcome home resolution in 1971 which stated: "The National Organization for Women oppose(s) any state, Federal, county, or municipal employment law or program giving special preference to veterans."

NOW later confirmed in a letter to me dated 29 July 1979 that the resolution still represented their policy.

This, in effect, opposes preferences or programs for even blind and paraplegic veterans.

As a Special Assistant to the Veterans Administration General Counsel in 1978, I assisted in the preparation of the lgeal memorandum which persuaded the Solicitor General to file an amicus brief in support of veterans' preference in *Feeney.*

We pointed out that the status of female non-veterans did not fall into play the "strict scrutiny" test and that veterans' preference statutes must only demonstrate a rational basis to survive an equal protection challenge.

Our concern in 1979 was that Federal veterans' preference statutes had a similar legislative history as the Massachusetts statute in question and that an adverse decision in *Feeney* could lead to an avalanche of Constitutional challenges of even less generous forms of veterans' preference under the guise that legislative bodies intended to discriminate against female non-veterans since it was a known fact that only 2% of veterans were female.

In February 1980, President Carter inadvertently forced NOW's hand on the issue of the draft by announcing that both young men and women should be required to register for the draft.

Heretofore, NOW and most other feminist organizations' policy was to take a "low profile" on the issue of the draft.

Only after Carter's 1980 announcement did "feminists" in their 30's and 40's who avoided service during Vietnam publicly state that it was acceptable to them if younger women of the 1980's faced draft laws and military service.

This inconsistency was not well received by the 20-year-old women who were so generously, if not abruptly thrust into the role of equality of responsibility by their once-reluctant older sisters.

Subsequent to the 1980 Carter draft registration announcement, *Rostker* v. *Goldberg*, filed by a male challenging the male-only draft during Vietnam was reborn and found its way to the Supreme Court.

NOW finally came out of the closet—15 years late—and filed an amicus brief in 1981 stating that "the requirement to register . . . for induction into the Armed Forces . . . if imposed at all . . . must be imposed equitably on all members of society who are capable of serving, irrespective of gender."

In a press conference announcing their brief (overdue by more than a decade) NOW President Eleanor Smeal incredibly stated that past exclusion from the draft had discriminated against women, rather than in their favor, by robbing women ". . . of the psychological knowledge that they can defend themselves."

In June 1981 the Supreme Court voted 6 to 3 to uphold the Constitutionality of male only draft registration in *Rostker.*

This ruling turned on Congress's Constitutional authority under Article I, Section 8 (as did Federal Court decisions in similar cases during Vietnam) to raise and maintain an armed forces.

NOW and its allies shed crocodile tears over Rostker.

Two years later, NOW began winning additional enemies for the ERA by announcing that the ERA's enactment is necessary for an attack on veterans' preference previously upheld in *Feeney.*

While the Military Order of the Purple Heart has previously not taken a position for or against the ERA, we will now be giving serious consideration at our National Convention this August to seeking an amendment to the ERA to protect veterans' preference.

Such an amendment would be similar to Title VII of the Civil Rights Act of 1964 which reads in part: "Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial or local law creating special rights or preference for veterans."

Mr. PHILLIPS. This policy of NOW, in effect, opposes preference or programs for even blind and paraplegic veterans. I tried for several years to get NOW to modify that position. I can prove that I have tried to do that, and I have had no success whatsoever. In fact, other women's organizations have, I think, beseeched NOW to modify its policy, at least with respect to the blind and paraplegic veteran.

Now, the *Feeney* case, of course, is again an issue today. It was referred to before Congress last September, as I said, by the League of Women Voters and the National Organization for Women.

In that case, the U.S. Supreme Court upheld Massachusetts veterans preference despite complaints that it benefited male veterans at the expense of female nonveterans. The Court observed that the preference was neutral on its face, benefited both male and female veterans and was not intended to discriminate against women as a class.

Accordingly, the Court held that the statute did not deny women equal protection of the law. In reaching its decision, the 7 to 2 majority cited the *Washington* v. *Davis* standard that in order to prove an invidious discrimination under the equal protection argument, a woman nonveteran must prove that there was an actual intent on the part of the legislature to discriminate against women when it enacted the preference statute.

In my role as the special assistant to the Veterans' Administration General Counsel in 1978 I assisted in the preparation of the legal memorandum which persuaded the Solicitor General to file an amicus brief in support of veterans preference in *Feeney*. We pointed out that the status of female nonveterans did not call into play the strict scrutiny test and that veterans preference statutes must only demonstrate a rational basis to survive an equal protection challenge.

Our concern in 1978 was that Federal veterans preference statutes had a similar legislative history as the Massachusetts statute in question and that an adverse decision in *Feeney* could lead to an avalanche of constitutional challenges of even less generous forms of veterans preference under the guise that legislative bodies intended to discriminate against female nonveterans since it was a known fact that only 2 percent of veterans were female.

In February 1980, President Carter inadvertently forced NOW's hand on the issue of the draft by announcing that both young men and women should be required to register for the draft. Heretofore, NOW and most other feminist organizations policies admittedly were to take a low profile on the issue of the draft. Only after President Carter's 1980 announcement did feminists in their thirties and forties who avoided service during Vietnam publically state that it was acceptable to them if younger women of the 1980's faced draft registration laws. This inconsistency was not well received by many 20-year-old women who were so generously, if not abruptly, thrust into the role of equality of responsibility by their once reluctant older sisters.

Subsequent to the 1980 Carter draft legislation announcement, a case filed by a male challenging the male-only draft during the Vietnam war was reborn and found its way to the Supreme Court. NOW finally came out of the closet, 15 years late, and filed an amicus brief in 1981 stating that,

> The requirement to register for induction into the Armed Forces if imposed at all must be imposed equitably on all members of society who are capable of serving irrespective of gender.

In a press conference announcing their brief, the NOW president ignored the terrible casualties suffered by draftees and incredibly stated that past exclusion from the draft had discriminated against women rather than in their favor by robbing women of the, "* * * psychological knowledge that they can defend themselves."

In June 1981, the Supreme Court voted 6 to 3 to uphold the constitutionality of male-only draft registration. This ruling, as did similar rulings during the Vietnam war, turned on Congress' constitutional authority under article I to raise and maintain an Armed Forces.

NOW and its allies shed predictable crocodile tears over that decision and 2 years later began winning additional enemies for the ERA by announcing that the ERA's enactment is necessary for an attack on veterans preference, which had previously upheld as constitutional in *Feeney*.

While the Military Order of the Purple Heart has previously not taken a position for or against the ERA, we will now be giving serious consideration at our national convention this August to seeking an amendment to the ERA to protect veterans' preference. Such an amendment would be similar to title VII of the Civil Rights Act of 1964 which reads in part, "Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial or local law creating special rights or preference for veterans."

[The following was received for the record:]

PREPARED STATEMENT OF DEAN K. PHILLIPS

It is an honor to represent the Military Order of the Purple Heart, chartered in 1958 by Congress to represent the interests of those Americans who sustained wounds while engaged in combat against our Nation's enemies.

I was initially elected National Judge Advocate of the Military Order of the Purple Heart at our National Convention in 1982, some 15 years after I was wounded in Southeast Asia while on a long range reconnaissance patrol near what was then known as War Zone "D".

The Issue today is the impact the Equal Rights Amendment may have on veterans' preference. Our organization is aware that last September the President of the League of Women Voters advised Congress that "... the broad Veterans' preference statute [unsuccessfully] challenged [by the National Organization for Women and other feminist organizations] in Massachusetts v Feeney [442 US 256] [1979] which granted an absolute lifetime preference to Veterans seeking Civil Service would fail in a challenge under the ERA."

We are also aware that last September the President of the National Organization for Women [NOW] also advised Congress that it is often impossible to prove the "intent" [required by Washington v Davis 426 US 229 [1976]] which is necessary to successful pursuit of sex discrimination cases. She concluded that "only by passage of the ERA will women finally secure full and unequivocal acknowledgement of their entitlement to legal equality."

I am aware that NOW was founded in 1966 and that Article III of their bylaws mandated "direct action to bring women into full participation of society now, exercising all the privileges and responsibilities thereof in truly equal partnership with men."

However, one area which NOW in particular and women's groups in general did not make a sincere effort to exercise "responsibilities in truly equal partnership with men" was service in the military during the Vietnam War. Accordingly, their bemoaning of the privileges earned by men and women who did serve [such as veterans' preference in civil service] has been less sympathetically received in many quarters.

1966 was also the year I gladly gave up my student deferment, which was unfair to those men of my generation who were not inclined to attend college, to enlist in the

U.S. Army paratroopers. Base pay for a PFC was less than $122 monthly. Although it was not an overriding factor in my decisiion to enlist, I was also aware that earlier that year Congress had enacted G.I. Bill and Veterans' Preference Legislation and that veterans' preference legislation could not be attacked under the Civil Rights Act and would extend to my widow if I were killed or 100% disabled.

As has been the case in most wars, many people were killed and maimed. Every member of my 26 member recon platoon was ultimately wounded at least once and all but five of us were either killed or so badly wounded that medical evacuation to Japan was required.

I am aware that between 1948 and 1967 Congress had limited the percentage of women in the Armed Forces to no more than two percent. However, any inference that women were beating down the doors of recruiting offices and draft boards demanding to exercise all the responsibilities of society in truly equal partnership with men is dispelled by a 1977 Office of the Secretary of Defense "Use of Women in the Military" Report which observed:

> With the advent of the Korean war, an unsuccessful effort was made to recruit some 100,000 women to meet the rapidly expanding manpower requirements. Young women just were not interested in serving, perhaps because of the unpopularity of that war at the time. Between 1948 and 1969, even including nurses, the percentage of women in the military never exceeded 1.5% and averaged 1.2 percent of the total active strength.

Congress lifted the 2% limit in 1967 but, in point of fact, females did not reach 2% of the Armed Forces until more than 5 years later in 1973, after U.S. ground troops were pulled out of Vietnam.

During the decade of the Vietnam war, men repeatedly unsuccessfully pleaded that the male-only draft unfarily denied males the equal protection guaranteed under the Fifth Amendment to the Constitution. Women, of course, were content to enjoy the privilege of exemption from the draft and NOW and similarorganizations did not join in such suits during the war--once again failing to bemoan exemption from the draft from either an equal employment opportunity or equal responsibility standpoint. Thus, the most blatantly sexist policy in our Nation's history -- the limitation of the drafting of those who would die and be maimed in war remained limited exclusively to the male sex. By 1969-1970 draftees suffered more than 60% of the U.S. Army casualties.

While NOW avoided facing up to the Vietnam War, that organization passed a welcome home resolution in 1971 which stated: "The National Organization for Women oppose(s) any state, federal, county, or municipal employment law or program giving special preference to veterans." NOW later confirmed in a letter to me dated 29 July 1979 that the resolution still represented their policy. This, in effect, opposes preferences or programs for even blind and paraplegic veterans.

In the *Feeney* case(*Personnel Administrator of Massachusetts et al v Feeney*, 442 U.S. 256 (1979) referred to before Congress last September by the League of Women Voters and NOW, the U.S. Supreme Court upheld a Massachusetts veterans' preference despite complaints from organizations such as NOW that it benefited male veterans at the expense of female non-veterans. The Court observed that preference statute was neutral on its face, and benefited both male and female veterans, and was not intended to discriminate against women as a class. Accordingly, the Court held that the statute did not deny women equal protection of the law. In reaching its decision, the 7 to 2 majority cited the *Washington v Davis* standard that in order to prove invidious discrimination under the equal protection argument, a woman non-veteran must prove there was an actual intent on the part of the legislature to discriminate against women when it enacted the preference statute.

In my role as the Special Assistant to the Veterans Administration General Counsel in 1978, I assisted in the preparation of the legal memorandum which persuaded the Solicitor General to file an *amicus* brief in support of veterans' preference in *Feeney*. We pointed out that the status of female non-veterans did not call into play the "strict scrutiny" test and that veterans' preference statutes must only demonstrate a rational basis to survive an equal protection challenge. Our concern in 1979 was that federal veterans' preference statutes had a similar legislative history as the Massachusetts statute in question and that an adverse decision in *Feeney* could lead to an avalanche of constitutional challenges of even less generous forms of veterans' preference under the guise that legislative bodies intended to discriminate against female non-veterans since it was a known fact that only 2% of veterans were female.

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In June 1981 the Supreme Court voted 6 to 3 to uphold the Constitutionality of male only draft registration (Rostker v Goldberg, 453 US 57). This ruling turned on Congress's Constitutional authority under Article I, Section 8 (as did Federal Court decisions in similar cases during Vietnam) to raise and maintain an armed forces.

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While the Military Order of the Purple Heart has previously not taken a position for or against the ERA, we will now be giving serious consideration at our National Convention this August to seeking an amendment to the ERA to protect veterans' preference. Such an amendment would be similar to Title VII of the Civil Rights Act of 1964 which reads in part: "Nothing contained in this subchapteer shall be construed to repeal or modify any Federal, State, territorial or local law creating special rights or preference for veterans."

[From the Washington Star, March 3, 1981]

NOW Leader Says Military Draft Causes Brutality Against Women

By a Washington Star Staff Writer

The nation's largest women's rights group yesterday attacked the military draft law as one of the causes of brutality against women in American society.

That is one of the main new arguments the National Organization for Women made in an attempt to get the Supreme Court to go far beyond constitutional issues when it considers the men-only draft.

NOW President Eleanor Smeal, discussing her group's plea to the court, said that the draft law is part of the "myth structure" in America that treats women as inferiors, adding to the risk that they will be "pushed around," even violently.

The feminist leader stressed that her organization sees the case on the draft law's constitutionality as a basic test of the court's attitude on sex discrimination in society as a whole, not just in the military.

NOW is taking part in the case as a "friend of the court." It filed its written views yesterday. The court refused to let NOW's attorney join in the hearing the justices will hold later this month on the case. As is customary, it gave no reason for the refusal.

The court is expected to issue a final decision by next summer on the draft law's constitutionality.

Leaving most of the legal argument to others involved in the case, NOW decided, Smeal said, to try instead to convince the court to analyse broader social problems that result from sex "stereotypes" in the nation.

"We want the court to know that, if there is going to be a draft, this is how it impacts on society," she said.

Confining the draft to men "contributes dramatically to the stereotype" that for generations has led to the "victimization of females," NOW's leader contended. "Women are being robbed of the psychological knowledge that they can defend themselves."

Since the draft law has to do with the way a nation defends itself, she said, the test case means the court will have to face "the whole right of self-defense for women."

Citing studies which she said show that women are more likely to be hurt or killed in sexual attacks when they are "passive" than when they resist, Smeal said that a male-only draft "reinforces passivity" and "it's passivity that leads to brutality."

— Lyle Denniston

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

PUBLIC AFFAIRS

June 1, 1979
Ref: CORR 79-160

Mr. Dean K. Phillips
1700 Sherwood Hall Lane
Alexandria, Virginia 22306

Dear Mr. Phillips:

This is in response to your Freedom of Information Act request dated May 12, 1979, for information on the number of cases "filed between August 4, 1964 and March 28, 1973, against the government by women claiming that more stringent standards existed for women that wanted to enter the military service".

Each Military Department has reviewed its litigation subject files for the period covered by your request. The Army and Navy report that their records do not reflect the filing of any such cases during the period in question. The Air Force reports two cases: Callahan v. Laird, Civ. No. 71-500M (D. Mass., filed 1971), dismissed as moot, (Dec. 1974); Howard v. Nixon, Civ. No. 16834 (N.D. Ga., filed 1972), * dismissed voluntarily by plaintiff, (July 1973).

We hope this information will be of assistance to you.

Sincerely,

Charles W. Hinkle
Charles W. Hinkle
Director, Freedom of Information
and Security Review

* womens' groups did not
participate in either of
these cases.

Senator HATCH. Thank you, Mr. Phillips.
Dean Shanor.

STATEMENT OF CHARLES A. SHANOR

Mr. SHANOR. Thank you very much.

Senator Hatch, Mr. Markman, ladies and gentlemen, my name is Charles Shanor. I am a professor of law and the associate dean at Emory Law School. I teach employment discrimination law and have written about sex discrimination issues concerning veterans' preference statutes. I have also written a book on military law.

In the interest of full disclosure, I should inform you of my biases. I do not represent veterans. I do not represent NOW. But I do have my own points of view about the issues before us today.

First, I support the ERA, more for its symbolic value than because of any specific changes that it might effectuate in the laws of our land. I oppose absolute lifetime veterans preferences, though I am not opposed to some lesser veterans preferences. I think absolute lifetime veterans' preferences encourage economic inefficiency and severely disadvantage women in obtaining Government jobs. My testimony, in a nutshell, is that I do not believe the ERA would overturn even absolute lifetime veterans' preferences. In short, I think the *Feeney* case would stand after the equal rights amendment, should it be ratified.

I thus disagree with the League of Women Voters president's statement which was quoted to you by Mr. Phillips a few moments ago. I will try to outline the reasons behind my conclusions.

The ERA's guarantee is that "equality of rights * * * shall not be denied or abridged * * * on account of sex." How broad this prohibition on sex discrimination is depends upon judicial responses to two questions. First, is the classification made by a law "on account of sex" when a gender-neutral statute impacts disproportionately on one or the other sex? And second, if an impact-only classification is "on account of sex," does it impermissibly deny "equality of rights"?

The first question is probably the crucial one with respect to the ERA's effect on most veterans programs, including veterans' preferences. As you know, these programs seldom distinguish on their face between men and women. Both male and female veterans receive the same benefits. Indeed, as Mr. Meloy pointed out, many veterans' preference statutes not only give preferences to veterans but also to their spouses. In the case of those sorts of statutes, the impact of a veterans' preference on women is further reduced.

Nevertheless, because an overwhelming percentage of this Nation's veterans are male, the beneficiary group is almost exclusively male.

In *Personnel Administrator* v. *Feeney,* which has been mentioned to you earlier, the U.S. Supreme Court held that Massachusetts' absolute lifetime veterans' preference statute did not deny equal protection of the laws to women. In reaching this conclusion, the Court said that the statute contained no discriminatory purpose and that disparate impact alone does not raise 14th amendment equal protection issues.

Incidentally, the Court reached its conclusion even as it acknowledged that the Massachusetts preference had an enormous disparate impact against women, that this impact was readily foreseeable at the time the preference was legislated, and that a major reason for the impact was that women had been precluded by statute and military regulation from entry into the armed forces. In the Court's words:

> [Discriminatory purpose] implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

The Court's footnote further explains the Justices' reasoning:

> This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [the veterans' preference] a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry, made as it is under the Constitution, an inference is a working tool, not a synonym for proof. When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof.

With the ERA, the same problem would arise: Is a statute having a disparate impact one which denies "equality of rights * * * on account of sex"? I will concede that it is possible that the Court might construe the ERA to reach such a result. However, this seems highly unlikely to me for several reasons.

First, such a construction would establish a broader scope to the ERA on sex discrimination issues than the 14th amendment has on race discrimination issues. At this time, there is neither any language nor any congressional history of which I am aware behind the ERA which would support such a construction. Moreover, Senator Hatch, you and the rest of Congress are in a position to make sure that that does not occur through legislative glosses on the ERA, at least to a limited extent as I will point out later.

Second, the Supreme Court has been reluctant to imbed antidiscrimination impact standards into the Constitution even when equivalent phrases in statutes might be construed as establishing impact standards.

For example, the Court unanimously held that title VII embodies a disparate impact standard in *Griggs* v. *Duke Power Company* while in *Washington* v. *Davis* it held that disparate impact alone does not establish race discrimination for 5th and 14th amendment purposes.

Third, an impact standard could subject an enormous range of legislation to relatively standardless judicial review. For example, because men make, on the average, more than women and because the income tax laws establish higher marginal tax rates for higher income taxpayers, progressive taxation arguably has a disparate impact on males. Would the ERA, under an impact standard, provide cause for challenging progressive tax rates? I doubt that the courts will have any zeal for facing such questions nor that many ERA supporters or opponents contemplate such challenges under the proposed constitutional provision.

Senator HATCH. They do not contemplate many of the challenges that undoubtedly are going to arise.

Mr. SHANOR. I understand that, Senator.

Senator HATCH. On your page 3 of your written testimony, you say "There is neither any language nor any congressional history behind the ERA which would support such a construction." Actually, there is quite a bit of legislative history behind it.

Mr. SHANOR. If I might comment on that, Senator Hatch, it is my understanding that this history basically shows that the ERA would go beyond the 14th amendment with——

Senator HATCH. That is right.

Mr. SHANOR [continuing]. With respect to the protection against gender or sex discrimination, but not that it would go beyond the 14th amendment with respect to——

Senator HATCH. But also on disparate impact as well. Let me just give you one illustration. Prof. Barbara Brown, in the leading textbook on the subject, has said there are a number of reasons why the holding in the *Washington* case requiring discriminatory intent will not be an appropriate standard under the ERA. Professor Emerson, Judith Avner, and others have testified that they agree with that analysis.

Mr. SHANOR. I understand.

Senator HATCH. And these are some of the principal proponents. We will be having an entire hearing on this issue sometime in the future.

Mr. SHANOR. Yes. I think that has to be put into context several ways, if I might comment on it. First of all, Professor Emerson, as you know, is a very staunch proponent of women's rights in a number of different contexts, not simply a supporter of the ERA. That testimony was rendered at a time before *Feeney* and, indeed, before *Washington* v. *Davis* was handed down, if we are talking about the same testimony.

Senator HATCH. This is testimony last year in the House, following *Feeney*.

Mr. SHANOR. In that case I am not familiar with——

Senator HATCH. There is no reason you should be. We will be happy to provide you with it.

Mr. SHANOR [continuing]. That particular part of Professor Emerson's testimony.

Congress, of course, could signal its desire that the ERA be read as a disparate impact constitutional provision. For two reasons, I would not recommend that course even though I personally would like to see the abolition of absolute lifetime veterans employment preferences.

First, effective development of constitutional history is much more problematic than development of statutory history. With a statute, Congress' words and its glosses to those words are the law. With a constitutional provision, State ratification processes intercede to raise doubts about whether glosses expressed earlier by Congress were later adopted by State ratifiers. Moreover, the function and permanence of constitutional provisions makes the use of constitutional history somewhat more problematical and less justifiable than the use of statutory history.

Second, legislation is a far easier and cleaner route by which Congress, if it desired to, could invalidate veterans employment preferences. Just as Mr. Phillips has pointed out to you that it would be possible to add a particular gloss to the equal rights amendment, concerning veterans' preferences to protect those preferences, Congress, if it desired the opposite result, could reach it much more cleanly and easily simply by amending title VII to delete section 712, which states that "Nothing [in title VII] shall be construed to repeal or modify any Federal, State, territorial or local law creating special rights to preferences for veterans." Such a deletion would adopt the *Griggs* statutory disparate impact standard for scrutiny of veterans preferences while avoiding adoption of a constitutional disparate impact standard.

The second question concerns the standard by which the courts would evaluate veterans preferences if, and only if, the ERA is applicable at all to veterans preference statutes. In my view, if the ERA applies, it will likely invalidate the preferences. My analysis rests upon my perception that sex-based equality of rights under the ERA is functionally equivalent, though the language is different, to race-based equal protection of the laws for 5th and 14th amendment purposes. If the ERA goes beyond the strict scrutiny standard in race cases to absolutely prohibit all forms under any circumstances of official gender distinction—and I am aware of some history to that effect and further commentary to that effect as well as some State judicial decisions under State ERA's which take the analysis beyond the strict scrutiny test to an absolute prohibition test—at any rate, if there is an absolute prohibition, my argument applies a fortiori.

As you are aware, the strict scrutiny test requires a compelling governmental interest to overcome the strong presumption that race categories are inpermissible. So seldom has the Government met this burden that strict scrutiny has been said generally to be fatal in fact to legislative provisions. If this standard were applicable to veterans preferences, I doubt that the Government could meet the compelling governmental interest requirement.

The only compelling governmental interest which has prevailed when subjected to strict judicial scrutiny is national defense. Two cases, *Hirabayashi* and *Korematsu,* both cases in the mid-1940's, upheld curfews and internment of Japanese Americans as World War II military support actions despite their racial ramifications and classifications. These cases, decided in unique historical circumstances, have repeatedly been criticized by commentators and restricted by courts to their facts in the 40 years since they were handed down.

A recent sex-discrimination case further illustrates judicial deference to Congress and the Executive on military matters. In *Rostker* v. *Goldberg,* the Court rejected an equal protection challenge to the male-only military draft registration process. Finding registration integral to developing a pool of potential combat troops, the Court deferred to Congress' decision to exclude women from combat duty. As the Court noted, Congress was certainly entitled in the exercise of its constitutional powers to raise and regulate armies and navies to focus on the question of military need rather than equity.

Rostker raises several interesting issues. First, would its holding have differed if the Court had applied strict scrutiny rather than merely middle-tier scrutiny under the fifth amendment. If this had been a race rather than a sex-based draft classification, the results surely would have been reversed, as the Court itself comments in dictum. That argues, I think, that *Rostker* would come out differently under the ERA.

And indeed, it seems to me, as sort of an aside at this point, that one of the real questions which remains on the agenda concerning the ERA's effect is its impact upon the expressed exclusions of women from combat and the like, which I assume you are addressing or have addressed in other testimony.

Second, even if the ERA would not reverse *Rostker*, veterans preferences will not likely receive the deference which the Court gave to the draft registration process. That is because such preferences constitute after-the-fact rewards rather than before-the-fact inducements or compulsion in the national defense picture and because they reward all military service, not merely combat service.

Indeed, as another aside, I frankly endorse Mr. Phillips' position to the extent that disabled veterans, it seems to me, could still be given substantial preference even if there is a striking down, under the ERA, of absolute lifetime veterans preferences.

As such civilian job preferences are substantially removed from the core concerns of the *Rostker* court which led it not to intrude on matters military. Finally, most veterans preferences are State rather than Federal preferences. The States, unlike Congress, have no special competency in or responsibility under the Constitution for military affairs.

In short, facially neutral veterans preference statutes make no classification on account of sex within the meaning of the ERA. Thus they are outside the ERA's reach. Only in the unlikely event that an impact standard is adopted under the ERA will the courts reach the question whether veterans preferences deny equality of rights to women. If the courts ever reach this latter question, I think it unlikely that the Government will be able to show sufficiently compelling reasons for giving absolute lifetime civilian job preferences to veterans to save these statutes.

Thank you.

[The following was received for the record:]

PREPARED STATEMENT OF CHARLES A. SHANOR

Mr. Chairman, Senators: My name is Charles Shanor. I am a Professor of Law and Associate Dean at Emory Law School. I teach Employment Discrimination Law and have written about sex discrimination issues concerning veterans' preference statutes. I also have written a book on military law.

In the interest of full disclosure, I should inform you of my biases. I support the ERA, more for its symbolic value than because of any specific changes it might effectuate in the laws of our land. I oppose absolute veterans' preferences, which encourage economic inefficiency and severely disadvantage women in obtaining government jobs. My testimony, in a nutshell, is that I do not believe the ERA would overturn even absolute veterans' preferences. I will attempt to outline my reasons for this conclusion.

The ERA's guarantee is that "Equality of rights . . . shall not be denied or abridged . . . on account of sex." How broad this prohibition on sex discrimination is depends upon judicial responses to two questions. First, is the classification made by a law "on account of sex" when a gender-neutral statute impacts disproportionately on one or the other sex? Second, if an impact-only classification is "on account of sex," does it impermissibly deny "equality of rights"?

The first question is probably the crucial one with respect to the ERA's effect on most veterans' programs, including veterans' preferences. As you know, these programs seldom distinguish on their face between men and women: both male and female veterans receive the same benefits. Because an overwhelming percentage of this nation's veterans are male, however, the beneficiary group is almost exclusively male.

In Personnel Administrator v. Feeney, 442 U.S. 256 (1979), the United States Supreme Court held that Massachusetts' absolute veterans' preference statute did not deny "equal protection of the laws" to women. In reaching this conclusion, the Court said that the statute contained no "discriminatory purpose" and that "disparate impact" alone does not raise Fourteenth Amendment issues. Incidentally, the Court reached its conclusion even as it acknowledged that the Massachusetts preference had an enormous disparate impact against women, that this impact was readily foreseeable at the time the preference was legislated, and that a major reason for the impact was that women had been precluded by statute and military regulation from entry into the armed forces. In the Court's words:

> "[Discriminatory purpose] implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."

The Court's footnote further explains the Justices' reasoning:

> "This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [the veterans' preference] a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry -- made as it is under the Constitution -- an inference is a working tool, not a synonym for proof. When as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof.

With the ERA, the same problem would arise: Is a statute having a disparate impact one which denies "equality of rights . . . on account of sex"? Though it is possible that the Court might construe the ERA to reach such a result, this seems unlikely to me for several reasons. First, such a construction would establish a broader scope to the ERA on sex discrimination issues than the Fourteenth Amendment has on race discrimination issues. At this time, there is neither any language nor any congressional history behind the ERA which would support such a construction. See generally the discussion in Brown, Emerson, Falk and Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871, at 896-907 (1971). Second, the Supreme Court has been reluctant to imbed antidiscrimination impact standards into the Constitution even when equivalent phrases in statutes might be construed as establishing impact standards. For example, the Court unanimously held that Title VII embodies a "disparate impact" standard in Griggs v. Duke Power Co., 401 U.S. 424 (1971) while in Washington v. Davis, 426 U.S. 229 (1976), it held that disparate impact alone does not establish race discrimination for Fifth and Fourteenth Amendment purposes. Third, an impact standard could subject an enormous range of legislation to relatively standardless judicial review. For example, because men make, on the average, more than women and because the income tax laws establish higher marginal tax rates for higher income taxpayers, progressive taxation arguably has a disparate impact on males. Would the ERA, under an impact standard, provide cause for challenging progressive tax rates? I doubt that the courts will have any zeal for facing such questions, nor that many ERA supporters contemplate such challenges under the proposed Constitutional provision.

Congress, of course, might signal its desire that the ERA be read as a disparate impact constitutional provision. For two reasons, I would not recommend that course even though I would like to see the abolition of absolute veterans' employment preferences. First, effective development of constitutional history is much more problematic than development of statutory history. With a statute, Congress' words and its glosses to those words are the law. With a constitutional provision, state ratification processes intercede to raise doubts about whether glosses expressed earlier by Congress were later adopted by state ratifiers. Moreover, the function and permanence of constitutional provisions makes the use of constitutional history more problematic and less justifiable than the use of statutory history. See generally, Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 203 (1980). Second, legislation is a far easier and cleaner route by which Congress could invalidate veterans' employment preferences. You could amend Title VII simply by deleting § 712, which states that "Nothing [in Title VII] shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans."

Such a deletion would adopt Griggs' statutory disparate impact standard for scrutiny of veterans' preferences while avoiding adoption of a constitutional disparate impact standard.

The second question concerns the standard by which the courts would evaluate veterans' preferences if the ERA is applicable at all. In my view, if the ERA applies, it will likely invalidate these preferences. My analysis rests upon my perception that sex-based "equality of rights" under the ERA is functionally equivalent to race-based "equal protection of the laws" for Fifth and Fourteenth Amendment purposes. If the ERA goes beyond the "strict scrutiny" standard in race cases to absolutely prohibit all forms of official gender distinctions, my argument applies a fortiori.

As you are aware, the "strict scrutiny" test requires a "compelling governmental interest" to overcome the strong presumption that race categories are impermissible. So seldom has the government met this burden that strict scrutiny has been said to be "fatal in fact." See Gunther, A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972). If this standard were applicable to veterans' preferences, I doubt that the government could meet the "compelling governmental interest" requirement.

The only compelling government interest which has prevailed under strict scrutiny is national defense. Two cases, Hirabayashi v. U.S., 320 U.S. 81 (1943) and Korematsu v. U.S., 323 U.S. 214 (1944), upheld curfews and internment of Japanese Americans as World War II military support actions despite their racial ramifications. These cases, decided in unique historical circumstances, have repeatedly been criticized by commentators and restricted by courts in the forty years since they were handed down.

A recent sex-discrimination case further illustrates judicial deference to Congress and the Executive on military matters. In Rostker v. Goldberg, 453 U.S. 57 (1981) the Court rejected an equal protection challenge to the male-only military draft registration process. Finding registration integral to developing a "pool of potential combat troops," the Court deferred to Congress' decision to exclude women from combat duty. As the

Court noted, "Congress was certainly entitled, in the exercise of its constitutional powers to raise and regulate armies and navies, to focus on the question of military need rather than equity." Id. at 80.

Rostker raises several interesting issues. First, would its holding have differed if the Court had applied "strict scrutiny" rather than merely "middle-tier scrutiny" under the Fifth Amendment? If this had been a race rather than a sex-based draft classification, the result surely would have been reversed, as the Court itself comments in dictum. Id. at 78. That argues, I think, that *Rostker* would come out differently under the ERA. Second, even if the ERA would not reverse *Rostker*, veterans' preferences will not likely receive the deference which the Court gave to the draft registration process. That is because such preferences constitute after-the-fact rewards rather than before-the-fact inducements or compulsions in the national defense picture and because they ______ reward all military service, not merely combat service. As such, civilian job preferences are substantially removed from the core concerns of the *Rostker* Court which led it not to intrude on matters military. Finally, most veterans' preferences are state rather than federal. The states, unlike Congress, have no special competency in or responsibility for military affairs.

In short, facially neutral veterans' preference statutes make no classification "on account of sex" within the meaning of the ERA and thus are outside the ERA's reach. Only in the unlikely event that an impact standard is adopted under the ERA will the courts reach the question whether veterans' preferences deny "equality of rights" to women. If the courts ever reach this latter question, I think it unlikely that the government will be able to show sufficiently compelling reasons for giving civilian job preferences to veterans to save these statutes.

*This statement has been reviewed by John H. Fleming, Esq., co-author with Professor Shanor of *Veterans' Preferences in Public Employment: Unconstitutional Gender Discrimination?* 26 Emory L.J. 13 (1977). Mr. Fleming wishes the Committee to know that he associates himself fully with these views.

Senator HATCH. Thank you so much

We will now turn to Prof. Gary L. McDowell, professor of political science at Newcomb College of Tulane University in New Orleans. Professor McDowell.

STATEMENT OF GARY L. McDOWELL

Mr. McDOWELL. Thank you, Mr. Chairman.

Some version of an equal rights amendment has been introduced in every Congress since 1923. Yet it was not until 1972 that a version finally passed both houses and headed for the States. Since the defeat of that proposed amendment on July 30, 1982, and the introduction of the present version on January 26, 1983, the politics surrounding the ERA has reached a fever pitch. The problem is that the procedure of amending or fundamental law—a procedure described by the framers of the Constitution as a most solemn and authoritative act—has come to be the object of such popular frenzy that we have lost sight of taking serious note of the sorts of changes that such an amendment would bring to our system of governance. During an election year when the rhetorical edges of the ERA debate will inevitably be honed sharper still, this committee is to be commended for attempting to introduce a bit of sober reflection on the practical effects of the proposed ERA.

Too often public debate focuses almost exclusively on the philosophic implications of the ERA; its practical effects on public policy generally receive, at best, superficial notice. But it is at that level of policy rather than the level of principle where public attention needs most to be drawn. While all decent instincts demand in principle an equality of treatment of women before the law, the administration of the institutions of government, in light of that principle, is what will touch the governed most immediately. Thus the most politically relevant question is what the ERA will mean in practice. What will its concrete effect be on the way in which we seek to govern ourselves?

A consideration of the relation of the ERA to veterans programs at both the Federal and the State levels exposes a fundamental practical question of administration. Is the standard of equal protection to be the standard of discriminatory intent or the standard of discriminatory impact? In brief, would a law contravene the ERA if, in practice, it led to a disproportionately discriminatory impact on women regardless of its intent? The answer to these questions will have a far reaching impact on public policy should the ERA be ratified.

The veterans programs bring this question of standards into sharpest focus because traditionally more men than women have been veterans. Any program intended to benefit veterans over nonveterans then has, to a degree, the apparent effect of benefiting men at the expense of women. The issue is whether preferential programs for veterans would violate the ERA. It seems clear to me that they would.

The policy of creating preferential programs for the hiring of veterans is neither new nor limited. While the form such programs may take may vary widely from a point advantage system to an absolute preference program, the underlying legislative motivation is much the same. The programs traditionally have been justified as a measure "designed to reward veterans for the sacrifices of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well disciplined people to civil service occupations." They have existed in various jurisdictions since shortly after the Civil War and they have been challenged so often that the rationale for their support has become essentially standardized.

While there has nearly always been criticism of such programs from various quarters, the general political sense of the community seems to have remained constant that such preferential treatment for veterans is a decent and desirable public policy. But even if a substantial case could be made that such policies shall fall short of prudence or are simply unfair, they would not, of necessity, violate the Constitution, at least as the Constitution now stands without the ERA. For as James Wilson saw fit to remind his fellow delegates to the Federal convention of 1787, "laws may be unjust, may be unwise, may be dangerous, may be distructive and yet not be unconstitutional."

It is this question of whether or not the ERA would render such preferential polices unconstitutional that is the central concern. In particular, would the ratification of the ERA have the effect of overturning the authoritative Supreme Court opinion on this issue, *Personnel Administrator of Massachusetts* v. *Feeney*.

The question brought in *Feeney* was whether Massachusetts lifetime preference to veterans discriminated against women in violation of the equal protection clause of the 14th amendment. The Court held that it did not. The logic of Justice Stewart's opinion was simple and direct. "The equal protection guarantee of the 14th Amendment does not take from the states all power of classification"; "When the basic classification is rationally based uneven effects upon particular groups within a class are ordinarily of no constitutional concern"; "The calculus of effect, the manner in which a particular law reverberates in a society, is a legislative and not a judicial reponsibility"; "In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification." The conclusion to Justice Stewart was inescapable: Any neutral law that has a disproportionally adverse effect upon a particular group is unconstitutional under the equal protection clause only if that impact can be traced to a discriminatory purpose. It is only purposeful discrimination that offends the Constitution. Disparate impact does not.

On the basis of *Feeney*, programs designed to confer preferential consideration on veterans are based on a gender neutral classification between veterans and nonveterans; that more men tend to be veterans than women is beside the constitutional point. Even if a legislature is aware of such a potential disproportionate impact, such awareness is not the same thing as discriminatory purpose. An inference of discriminatory intent drawn from the evidence of a disproportionate impact is not sufficient to violate the constitutional right to equal protection of the laws. Inference is not proof of intent.

Veterans preference programs do not reflect a purpose to discriminate on the basis of sex. They reflect a legislative intention to benefit veterans over nonveterans of either sex, not to benefit men over women.

The ratification of the ERA would be likely to lead to the abandonment of this standard of discriminatory intent in favor of the standard of discriminatory impact. That this is so seems clear for three reasons.

First, the proposed ERA is, at best, ambiguous. The result of such textural ambiguity is to invite, nay, demand, judicial intrusion in order to determine as precisely as possible what the amendment actually means. The ERA, if adopted, would be, as Walter Berns has pointed out to this committee, the only provision in the Constitution bestowing or protecting a right without identifying the right. Given the commonsense view that if the ERA is ratified it must mean something other than what the equal protection clause of the 14th amendment means—if not, then why adopt it—then it must tighten considerably the standards of what constitutes a violation of equal rights. The standard of discriminatory impact is undoubtedly a tighter standard than discriminatory intent. Thus, logically, it would seem fair to assume that under the ERA the standard for proving unconstitutional discrimination against women would be discriminatory impact.

The second reason this movement seems likely is that on the question of impact versus intent the Supreme Court in *Feeney* was split. Dissenting from the majority, Justices Marshall and Brennan were willing to strike down the veterans preference law in that case because in their view when the foreseeable impact of a facially neutral policy is so disproportionate the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme. With the ERA rather than the 14th amendment serving as the constitutional point of departure for such inquiries into allegations of gender-based discrimination, it would not be surprising to find the logic of Marshall and Brennan more persuasive.

The third and final reason such a movement from the standard of intent to the standard of impact seems likely is that most, if not all of the proponents of the ERA, argue that such a movement would, in fact, be the desired result of ratification. Dorothy Ridings of the League of Women Voters has suggested that such veterans preference laws as the one at issue in *Feeney* would "fall in a challenge under the ERA." Professor Ann Freedman of Rutgers Law School, a leading legal theoretician of the ERA, has argued before the House of Representatives that "strict judicial scrutiny under the ERA would be required if a neutral rule that has disparate impact on members of one sex is traceable to or perpetuates discriminatory patterns similar to those associated with facial discrimination." The analysis of Justices Marshall's and Brennan's dissent in *Feeney*, Professor Freedman believes, "illustrates the approach required by the ERA." Pro. Thomas Emerson of Yale also testified to the fact that the "outcome of *Feeney* would plainly be different under the ERA." As Professor Emerson went on to explain:

> While the Massachusetts veterans preference statute considered in *Feeney* may not have denied equal protection of the laws under the 14th amendment, *it certainly denies equality of rights under the laws*. The fact that there was not overt intention

to harm women would not be decisive. The result arising from habitual patterns of exclusion was there for all to see and feel.

As leading legal authorities on the equal right amendment, the view of Professors Freedman and Emerson would surely be influential in shaping the sorts of arguments that would be brought to bear on the question of intent versus impact in the flood of litigation that would undoubtedly be released by the ratification of the ERA.

This view is not one that is merely whispered in scholarly closets. The legal profession has been greatly influenced by it. Martha Barnett of the American Bar Association has argued in favor of supplanting the standard of discriminatory intent with the standard of discriminatory impact. "The principle of equality," she suggested, "is rendered impotent if it cannot reach laws which effectively exclude women from employment for which they are fully qualified and competent."

It is these three factors, then—the ambiguity of the proposed amendment, a judiciary somewhat divided on the question of intent versus impact; and the rather clear position of those most likely to press for the impact standard in litigation under the ERA—that I believe would come together and lead to the abandonment of the standard of intent in favor of the standard of impact, and thus lead to veterans preference programs being declared unconstitutional violation of equality of rights under the law as provided for in the equal rights amendment.

[The following was received for the record:]

PREPARED STATEMENT OF GARY L. McDOWELL

Some version of an Equal Rights Amendment has been introduced in every Congress since 1923. Yet it was not unitl 1972 that a version finally passed both houses and headed for the states. Since the defeat of that proposed Amendment on June 30, 1982, and the introduction of the present version on January 26, 1983, the politics surrounding the ERA has reached a fever pitch. The problem is that the procedure of amending our fundamental law -- a procedure described by the Framers as a most "solemn and authoritative act" -- has come to be the object of such popular frenzy that we have lost sight of taking serious note of the sorts of changes such an amendment would bring to our system of governance. During an election year when the rhetorical edges of the ERA debate will inevitably be honed sharper still, this committee is to be commended for attempting to introduce a bit of sober reflection on the practical effects of the proposed ERA.

Too often public debate focuses almost exclusively on the philosophic implications of the ERA; its practical effects on public policy generally receive, at best, superficial notice. But it is at that level of policy rather than the level of principle where public attention needs most to be drawn. While all decent instincts demand in principle an equality of treatment for women before the law, the administration of the institutions of government in light of that principle is what will touch the governed most immediately. Thus, the most politically relevant question is what the ERA will mean in practice; what will its concrete effect be on the way in which we seek to govern ourselves?

A consideration of the relation of the ERA to veterans' programs (at both the federal and state levels) exposes a fundamental practical question of administration. Is the standard of equal protection to be the standard of *discriminatory intent* or the standard of *discriminatory impact*? In brief, would a law contravene the ERA if in practice it led to a disproportionately discriminatory impact on women regardless of its intent? The answer to these questions will have far reaching impact on public policy should the ERA be ratified. The veterans' programs bring this question of standards into sharpest focus because traditionally more men than women have been veterans; any program intended to benefit veterans over non-veterans, then, has to a degree the apparent effect of benefitting men at the expense of women. The issue is whether preferential programs for veterans would violate the ERA. It seems clear to me that they would.

The policy of creating preferential programs for the hiring of veterans is neither new nor limited. While the forms such programs take may vary widely -- from a point-advantage system to an absolute preference program -- the underlying legislative is much the same. The programs traditionally have been justified as a "measure designed to reward veterans for the sacrifices of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations." (Massachusetts v. Feeney, 442 U.S. 256, 265 (1978).) They have existed in various jurisdictions since shortly after the Civil War; and they "have been challenged so often that the rationale for their support has become essentially standardized." (at 265, n. 12). While there has nearly always been criticism of such programs from various quarters, the general political sense of the community seems to have remained constant that such preferential treatment for veterans is a decent and desirable public policy. But even if a substantial case could be made that such policies fall short of prudence, or are simply unfair, they would not of necessity violate the Constitution (at least as the Constitution now stands, without the ERA). For as James Wilson saw fit to remind his fellow-delegates to the Federal Convention of 1787, "Laws may be unjust, may be unwise, may be dangerous, may be destructive; . . . and yet not be . . . unconstitutional." It is this question of whether or not the ERA would render such preferential policies unconstitutional that is the central concern. In particular, would the ratification of the ERA have the effect of overturning the authoritative Supreme Court opinion on this issue, Personnel Administrator of Massachusetts v. Fenney.

The question brought in Feeney was whether Massachusetts' absolute lifetime preference to veterans discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment. The Court held that it did not. The logic of Justice Stewart's opinion was simple and direct. "The equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification";"When the basic classificaiton is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern"; "The calculus of effect, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility"; "In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification." (442 U.S. 256, 271-272). The conclusion, to Justice Stewart, was inescapable: any neutral law that has a "disproportionally adverse effect" upon a particular group is "unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." (id. at 272; see Washington v. Davis, 426 U.S. 229 (   ) and Arlington Heights v. Metropolitan Housing Development Corp. 429 U.S. 252 (   ).) It is only "purposeful discrimination" that offends the Constitution; disparate impact does not.

On the basis of Feeney, programs designed to confer preferential consideration on veterans are based on a gender-neutral classification between veterans and nonveterans; that more men tend to be veterans than women is beside the constitutional point. Even if a legislature is aware of such a potential disproportionate impact, such awareness is not the same thing as discriminatory purpose. An inference of discriminatory intent drawn from the evidence of a disproportionate impact, is not sufficient to violate the constitutional right to equal protection of the laws. Inference is not proof of intent. (442 U.S. 256, 279, n. 25). Veterans' preference programs do not reflect a purpose to discriminate on the basis of sex; they reflect a legislative intention to benefit veterans over nonveterans of either sex, not to benefit men over women.

The ratification of the ERA would be likely to lead to the abandonment of this standard of discriminatory intent in favor of the standard of discriminatory impact. That this is so seems clear for three reasons. First, the proposed ERA is, at best, ambiguous. The result of such textual ambiguity is to invite --

nay, demand -- judicial intrusion in order to determine as precisely as possible what the Amendment actually means. (The ERA if adopted would be, as Walter Berns has pointed out, the only provision in the Constitution bestowing or protecting a right without identifying the right.) Given the common sense view that if the ERA is ratified it *must* mean something other than what the Equal Protection Clause of the Fourteenth Amendment means (if not, why adopt it?) then it must tighten considerably the standards of what constitutes a violation of equal rights. The standard of *discriminatory impact* is undoubtedly a tighter standard than *discriminatory intent*. Thus, logically, it would seem fair to assume that under the ERA the standard for proving unconstitutional discrimination against women would be *discriminatory impact*.

The second reason this movement seems likely is that on this question of *impact* versus *intent*, the Supreme Court in *Feeney* was split. Dissenting from the majority, Justices Marshall and Brennan were willing to strike down the veterans' preference law in that case because in their view when "the foreseeable impact of a facially neutral policy is so disproportionate, the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme." (442 U.S. 256, 284). With the ERA rather than the Fourteenth Amendment serving as the constitutional point of departure for such inquiries into allegations of gender-based discrimination, it would not be surprising to find the logic of Marshall and Brennan more persuasive.

The third and final reason such a movement from the standard of *intent* to the standard of *impact* seems likely is that most if not all of the proponents of the ERA argue that such a movement would in fact be the desired result of ratification. Dorothy Riddings of the League of Women Voters has suggested that such veterans' preference laws as the one at issue in *Feeney* would "fall in a challenge under the ERA." Professor Ann Freedman of Rutgers Law School, a leading legal theoretician of the ERA, has agrued before the House of Representatives that "strict judicial scrutiny under the ERA would be required if a neutral rule that has a disparate impact on members of one sex is traceable to or perpetuates discriminatory patterns similar to those associated with facial discrimination." The analysis of Justices Marshall's and Brennan's dissent in Feeney, Professor Freedman believes "illustrates the approach required by the ERA." Professor Thomas Emerson of Yale also testified to the fact that the "outcome of Feeney would plainly be different under the ERA." As Professor Emerson went on to explain:

> While the Massachusetts' veterans preference statute considered in Feeney may not have denied 'equal protection of the laws' (14th Amendment), it certainly denies 'equality of rights under the law.' The fact that there was not overt intention to harm women would not be decisive; the result arising from habitual patterns of exclusion was there for all to see and feel. (Cong. Rec. H559 February 7, 1984; emphasis supplied).

As leading legal authorities on the Equal Rights Amendment, the view of Professors Freedman and Emerson would surely be influential in shaping the sorts of arguments that would be brought to bear on the question of intent versus impact in the flood of litigation that would undoubtedly be released by the ratification of the ERA.

This view is not one that is merely whispered in scholarly closets; the legal profession has been greatly influenced by it. Martha Barnett of the American Bar Association has argued in favor of supplanting the standard of discriminatory intent with the standard of discriminatory impact. "The principle of equality," she suggested, "is rendered impotent if it cannot reach laws which effectively exclude women from employment for which they are fully qualified and competent." (Cong. Rec., H559)

It is these three factors, then -- the ambiguity of the proposed amendment; a judiciary somewhat divided on the question of intent versus impact; and the rather clear position of those most likely to press for the impact standard in litigation under the ERA -- that I believe would come together and lead to the abandonment of the standard of intent in favor of the standard of impact and thus lead to veterans' preference programs being declared unconstitutional violations of "equality of rights under the law."

Senator HATCH. Thank you. All four of you have given excellent statements. Many of the leading proponents of the equal rights amendment, including the League of Women Voters, the American Bar Association, and Prof. Thomas Emerson of the Yale Law School have argued that the ratification of the equal rights amendment would result in the overturning of the Supreme Court's decision in *Massachusetts* v. *Feeney,* upholding the constitutionality of veterans preference programs.

Could each of you, briefly summarize again your view on this particular issue? Let us start with you, Mr. Meloy. We will go left to right.

Mr. MELOY. I would agree with Professor Emerson, maybe for different reasons. I am not sure of the basis for his argument, but mine would be that if the equal rights amendment were to pass, the kind of standard, whether you call it a disparate impact standard, an effect standard or an intend standard that has been applied by the Supreme Court in race cases would also apply in sex cases.

It seems to me that if *Feeney* were alleging a violation of his rights on the basis of race, the decision would have been different. It would have been different because the Court would have focused and would have placed a higher burden on the State to support the kind of method it had, the kind of alternatives that might be available, and I do not think that they would have met that burden in *Feeney.*

Senator HATCH. So you are saying that, in your opinion, the application of the equal rights amendment would overrule *Feeney* and thus disallow veterans preferences?

Mr. MELOY. Absolute veterans preferences. I am not sure that my conclusion would be the same with respect to a statute like Montana's is now which is very narrowly tailored.

Senator HATCH. Professor McDowell.

Mr. MCDOWELL. Yes, I do believe that the adoption of the ERA would overturn *Feeney* precisely because the amendment itself is ambiguous to a degree that we have no idea that it would not, and it would be left to litigation to prove whether it did or not, and the inclination of those most likely to press litigation would be pressing the argument that impact should supplant intent as the standard of discrimination.

Senator HATCH. Mr. Shanor.

Mr. SHANOR. I do not believe that *Feeney* would be changed under the equal rights amendment. I have to concede, of course, as with any constitutional provision, that there is opportunity for after-the-fact judicial interpretation.

Nevertheless, it does seem to me that the better reading of the language and of the purposes of the equal rights amendment would be served by not establishing an effect standard but rather maintaining the intent standard of *Feeney.*

Incidentally, in respose to Mr. Meloy's point, *Washington* v. *Davis* was a race case in which the Court said the intent standard, not an effect standard, governs under the equal protection clause.

I think that would be proof and should be proof under the equal rights amendment also.

Senator **Hatch**. Do you believe that the ERA would incorporate into the Constitution a view of sex discrimination approximating that of the dissenting opinion in the *Feeney* case?

Mr. **Shanor**. No, I do not. I do not go so far as to say that because I believe that the dissenters in the *Feeney* case said that there would be an impact standard, and that impact alone would be adequate.

Senator **Hatch**. You do not think it will go that far?

Mr. **Shanor**. I do not think it goes that far. I do think it goes as far as the dissenters on the level of scrutiny that would be required once the ERA applies to a particular statute. That is, it would be strict scrutiny or something which could even be termed as absolute invalidation, but only if it reaches that.

Senator **Hatch**. If the Court decides there is an impact standard, would *Feeney* then be overruled? Would that make a difference?

Mr. **Shanor**. Yes.

Senator **Hatch**. Mr. Phillips.

Mr. **Phillips**. Well, sir, that is our concern. The Military Order of the Purple Heart representing combat wounded veterans, that veterans preference would ultimately be overturned, not just absolute preference, since legislative histories of the Federal preference statute of 1944 is very similar to the legislative history of the Massachusetts statute at issue in the *Feeney* case.

We are going to be reviewing this issue at our national convention, as I said, as I think other veterans organizations will. Whether we recommend that the ERA itself be amended to protect veterans preference as was the Civil Rights Act of 1964 or whether we would be satisfied that just a clear intent expressed in the legislative history would be sufficient will then be classified. Today we are speculating on the impact of the ERA.

Senator **Hatch**. Thank you.

Professor Shanor, you speculate in your Emory Law Review article that:

> It is possible, of course, that the Supreme Court would not read the same intent requirement into the ERA as the Court in *Washingon* v. *Davis* read into the equal protection clause.

Do you still believe that this is a possibility?

Mr. **Shanor**. It is a possibility, but as I continue in my footnote in that article, I think that would be ironic, unfortunate and a misreading of the ERA.

Senator **Hatch**. The fact that the result would be ironic and unfortunate certainly does not prevent the Court from reading an effects test into the ERA?

Mr. **Shanor**. I agree. On the other hand, I think that is inevitable under our system of judicial review.

Senator **Hatch**. Sure.

Mr. **Shanor**. That is, with any constitutional amendment including all of those that have previously been passed.

Senator **Hatch**. Assuming that the Court did not follow the recommendation of individuals such as Professors Emerson and Freedman and incorporate a disparate impact standard into the ERA, could a case, nevertheless, be made that the equal rights amendment, by establishing sex as a suspect classification, and by heightening the nature of the judicial review, could call veterans preference laws into question?

Mr. Meloy.

Mr. MELOY. Senator, we are still constrained by the Supreme Court rulings with respect to interpretation of the analysis in suspect cases, and I see no reason why the Court would feel any differently with sex-based discriminations as they have with race-based discriminations, and it seems to me that that is a balancing of interests between intent and impact, and I think that is what the Court looked at in *Washington* v. *Davis,* and the *Arlington Heights* case, in fact, has language that says, if the zoning commission had known the impact that they were having by zoning out minorities, then, perhaps, the classification would not stand.

In *Massachusetts* v. *Feeney,* the Massachusetts court knew the impact they were having and they still adopted a preference, notwithstanding the knowledge of that impact, and it seems to me that if the law of Arlington Heights which is in the same genre as *Washington* v. *Davis* replied in *Feeney,* the Court would have come to a different conclusion.

Senator HATCH. Mr. McDowell.

Mr. MCDOWELL. I believe that under the ERA one could fashion a new theory of discriminatory intent rather than impact insofar as any veterans preference programs will inevitably benefit more men than women. I do not feel, as Mr. Meloy does, that the Court would necessarily feel constrained to abide by the doctrinal kinds of configurations they fashioned under the 14th amendment. The ERA opens up a whole new field of constitutional adjudication.

I think that there would probably be new standards that could be established that would effectively lead to those conclusions.

Senator HATCH. Mr. Shanor.

Mr. SHANOR. I would simply reiterate that I think it does not adopt and should not be read to adopt an impact standard, and therefore, with respect to all veterans programs except for those very few which may not be facially neutral, that you would never reach the suspect classification question.

Senator HATCH. Let us assume that you do, though. Even if the intent standard of identifying sex discrimination were maintained, is it possible that the ERA by establishing a more rigorous standard of review for classifying disadvantaged women, could render veterans preference laws unconstitutional?

Mr. SHANOR. I do not think it is more likely under the ERA than it was under the equal protection clause language in *Feeney* that the courts are going to say there was an intent to disadvantage women through these statutes.

That is, there are clearly legitimate beneficial purposes to these statutes benefiting veterans.

Senator HATCH. Mr. Phillips.

Mr. PHILLIPS. Well, sir, I am concerned about the evolvement of this to make sex a suspect classification. If I remember the *Schlessinger* v. *Ballard* case in 1975, and I am sure my law professor friends will know that case better than myself and can correct me on this, did not a plurality of the Court say sex was a suspect classification?

Mr. SHANOR. That was *Frontiero* v. *Richardson.*

Mr. PHILLIPS. That was primarily the 1973 case? Thus I am concerned from the standpoint that if sex had been declared a suspect classification early in the Vietnam war years, I would not be so irate about what is going on now that the war is over and I am all of a sudden hearing this clamoring about the inference from some organizations that during Vietnam, women's groups were beating down the doors of the recruiting offices and draft boards demanding equal employment opportunity.

To hear this after the war is over, after the fact, concerns me, and I think it smacks of hypocrisy. There is a concern here if sex becomes a suspect classification only after the dying is over in Vietnam, born so disproportionately by men.

I find that a little bit late especially for the guys that were killed or maimed. I cannot be positive what the impact of ERA will be, but I have the concern that the strict scrutiny test would then be applied in attacks on veterans programs.

Senator HATCH. I think everybody would have to be concerned if sex were to be raised to the level of a suspect classification. There is the possibility that that alone, even under an intent standard, would outlaw veterans preferences.

Are veterans preference laws in unavoidable conflict with affirmative action policies designed to establish hiring preferences for racial or sexual minorities?

Mr. MELOY. The question is, would there be a conflict between statutory preference for veterans as opposed to a statutory preference for women, for example, to correct a previously low number of women in the employment force; is that the question?

Senator HATCH. Is there an inherent conflict between the policies underlying veterans preference and affirmative action?

Mr. MELOY. Well, I would think the question, I think, resolves itself into the question that the U.S. Supreme Court has considered in *Bakke*, and that is whether or not benign discrimination suffers constitutional infirmities, and I think the Court has been ambivalent about that, and I would guess that it would be possible constitutionally to narrowly tailor a preference for veterans such as the Montana Legislature has done and at the same time that preference could work well with an affirmative action program which is designed to increase the number of women in employment, in, say, Government, and neither of those would necessarily have to fall in constitutional challenge.

Senator HATCH. Mr. McDowell.

Mr. McDOWELL. As I recall the question, it was whether the veterans preference is in tension with affirmative action policies?

Senator HATCH. Yes. Would it be in conflict with affirmative action policies which are designed to establish hiring preferences for women and minorities?

Mr. McDOWELL. In principle, I do not think so. I think that statistically one of the things that has been shown from 1976 on is that an increase in the number of minorities and women taking advantage of veterans preference first-hire which would indicate that it is not undercutting fundamentally the initiatives undertaken for affirmative action.

Senator HATCH. Mr. Shanor.

Mr. Shanor. I think there is certainly an impact of veterans' preferences against hiring opportunities for women. I do not believe that there is currently any affirmative action legislation on the books which gives a similar preference to women or to minorities because of their status within those groups.

Indeed, title VII, as you are aware, is not an affirmative action statute as such but a nondiscrimination statute, and the OFCCP regulations are relatively limited in the extent of their affirmative action programs and the enforcement powers under the OFCCP regulations.

So I do think that there is an impact against women. There is probably a beneficial effect for minorities because there tend to be larger numbers of minorities than of white males in the Armed Forces.

Senator **Hatch.** That goes to my next question. Mr. Phillips.

Mr. Phillips. Sir, I would like to expand on that. That is precisely how I feel as far as the ethnic minorities. Black Americans took a disproportionate percentage of the casualties in Vietnam, 30 percent higher than their percentage in the military.

If we get in a shooting war now, the casualty rate for blacks would be as high as 40 percent. The same statistics are in effect for Hispanic Americans.

I feel, though, that veterans preference is something that has been earned through service to the country, in some cases, through a very heavy price that has been paid. The Equal Employment Opportunity Act Amendments of 1972 are not based on something that was earned as far as I am concerned.

As long as you continue to have a draft law that exists as it has in the past with people sort of waiting the side lines for the war to end so they could make their case that they were not subject to it, you are going to have a disproportionate percentage of veterans being men.

There has been change in more recent years. There are now a lot more women veterans. Women in the Armed Forces, for the most part, are doing an excellent job from every report I have had, and as this trend evolves, you are going to have less of a problem with veterans preference as a disproportionate impact on women as a class.

Senator **Hatch.** It appears that minorities might have their employment opportunities in the Government diminished should the equal rights amendment pass and do away with veterans preference laws.

Let me go to this question. Title VII is, of course, the principal existing statutory provision relating to the equal employment opportunities for women.

Section 712 of the Civil Rights Act of 1964 explicitly states that veterans preference laws are not to be considered in violation of title VII.

By failing to place analogous language into the equal rights amendment itself, are we suggesting by negative implication that veterans preference laws may be in violation of the amendment?

Mr. McDowell. I would say that is a very strong likelihood, if not by negative implication, at least by leaving the choice open to the judiciary to determine that. I think that such exceptions should be attached to such an amendment as ambiguous as the ERA; but then that calls into question the inherent ambiguity and the difficulty of the amendment as it stands.

Senator HATCH. If it is the intention of Congress that the ERA not impact veterans preference laws, would Congress not be prudent to state this policy in the express language of the amendment? Would you, in fact, favor that type of language or that kind of an amendment?

Mr. McDOWELL. I would say yes.

Senator HATCH. Mr. Shanor.

Mr. SHANOR. I would have to agree that expressed language is always more clear than legislative history, particularly on constitutional amendment provisions. That is not to say, however, that you could not accomplish the same result if you put in legislative history to that effect in conjunction with passage of the ERA, should you choose to do that.

Senator HATCH. Would you favor adding language to the equal rights amendment that would clarify this issue?

Mr. SHANOR. I would prefer to see it done through legislative history simply because with constitutional amendments I think it is generally better to keep them relatively clean.

Senator HATCH. Why not end the controversy?

Mr. SHANOR. I would not oppose it.

Senator HATCH. You would not. I would say let us end the controversy. It may depend on the language but at least——

Mr. SHANOR. I would not oppose that.

Senator HATCH. OK. Mr. Phillips, how do you feel about adding language to the ERA to make certain that veterans preference laws would not be affected?

Mr. PHILLIPS. Sir, our organization has not taken a position yet. As I said, we are going to be reviewing that.

Senator HATCH. How do you feel personally?

Mr. PHILLIPS. In light of the comments attributed to the people from NOW and from the League of Women Voters, whom I do not see as our friends, I would be more inclined to go for an amendment, and if it were effective enough just to go with the legislative history, but I am concerned about whether legislative history would really be effective.

Senator HATCH. As you all know, veterans preference laws not only affect the initial hiring into the civil service but frequently affect promotional policies as well.

Are the constitutional issues in both instances relatively similar? Mr. Meloy.

Mr. MELOY. Well, in Montana, the promotion policies are a direct result of having a job to begin with. In Montana it has had an impact on increasing the number of males in higher echelon jobs, and those are the ones that get promoted.

Therefore, as part of our constitutional challenge we are attempting to establish that not only does the preference cause problems for hiring to begin with but because promotions tend to occur more frequently in the higher echelon, women are not being promoted at the same rate as the males in similarly situated circumstances.

Mr. McDowell. I would say that any kind of preferential treatment would violate the ERA.

Senator Hatch. Mr. Shanor.

Mr. Shanor. As a constitutional matter, I have to agree. At least I agree that promotions would be dealt with as a constitutional matter the same way as initial hires. In terms of policy questions, and it is more for legislation than for constitutional provisions, I think one can distinguish between the desirability of either the escalator principle that veterans get their jobs back or get promotions they would have had when they return from active duty and the extension of absolute lifetime veterans' preferences to give promotions on down the line. At that point you start, as a policy matter, to have an impact on efficiency of operations of the Government.

Senator Hatch. Mr. Phillips.

Mr. Phillips. Sir, it has been my experience in reviewing veterans' preference statutes that very few statutes actually give preference with respect to promotion. The major problem from the standpoint of many nonveteran females has been initial hire and layoffs. That was actually an issue in the *Feeney* case.

Senator Hatch. If the equal rights amendment is passed, are you concerned about veterans' programs in general being called into question?

Mr. Phillips. Yes; that would open the door. I was just talking from a policy standpoint. I have noticed the main gripe about the preference is not so much with promotions as initial hiring and layoffs. Yes; I think there are those who would just like to take away about anything they could from veterans, whether they be disabled or not.

Senator Hatch. Let me ask that same question of the two professors. To the extent that veterans' preference laws are challenged on constitutional grounds due to the equal rights amendment, is there any possibility that other veterans' programs will be similarly called into question?

Mr. Shanor. Yes.

Senator Hatch. Mr. McDowell.

Mr. McDowell. I would say yes.

Senator Hatch. That is my contention, too. The point is that we do not know the extent to which veterans' laws will be called into question. One of the problems that I personally have with the equal rights amendment has been brought out repeatedly in these hearings: Nobody knows how it is going to be applied. Not that we have to know every detail, but we ought to know whether or not it will be applied detrimentally in relationship to various groups in this country.

A number of State veterans' preference programs provide advantages not only to the veteran himself or herself but also to certain relatives of the veteran, such as the spouse or the parent.

A number of veterans' preference laws provide explicit advantage only to the mother of the veteran as opposed to the parents of the veteran. I have two questions here pertaining to this.

First, does the advantage provided to the wife or mother help mitigate what some see as the unconstitutionality of the veterans' preference under the ERA? Second would such a preference accorded solely to the female parent of the veteran, that is, the mother, be constitutional under the ERA?

Mr. **Shanor**. Well, I think a preference to a wife or to a mother, because that is a one-way gender classification, only women, is probably—well, it would be unconstitutional under the ERA.

Senator **Hatch**. Does that concern you at all?

Mr. **Shanor**. No; it does not because the converse of that is that at least if an intent standard is adopted, spouses or parents language in those statutes would provide absolutely no problem.

Mr. **McDowell**. In answer to your first question, my guess would be that such provisions should undercut the criticism of the constitutionality of veterans' preference; and, second, I think that on the basis of the ERA, such single-sex preference for the female members of the veterans' family would be unconstitutional.

Senator **Hatch**. There are nearly as many men as women who are disadvantaged by the veterans preference; that is, there are as many male nonveterans in the work force as female nonveterans. How can veterans' preference be viewed as unconstitutional gender discrimination given this fact?

Mr. **Shanor**. Well, part of it depends upon whether you look at the problem from the direction of who gets the advantage and therefore who gets the job or whether you look at it from the point of view of what is the residual pool of all those folks who do not get the jobs.

It seems to me that not only title VII but basically all of our employment-related laws look at the question from the perspective of who gets the job, and in that sense, the veterans' preference does give a substantial advantage to a predominantly male group.

Mr. **McDowell**. I would point out that that logic about the equal numbers of disadvantaged male and females in the nonveteran work force was at the heart of Justice Stewart's opinion in *Feeney*, but I think also that there would be the tendency, under the ERA, to go to an impact standard which would be, in effect, that more men were getting jobs at the expense of women because more veterans were men.

Senator **Hatch**. I see. Could you briefly summarize for the committee the type of veterans' preference program that would pass muster under the ERA and the type which would not? What are the criteria?

Mr. **McDowell**. I would be inclined to say that all veterans' preference programs would be invalidated.

Mr. **Shanor**. Consistent with my earlier testimony, I would think that only those veterans' programs which make classifications based upon gender, that is, preferences which run exclusively to male veterans or which run exclusively to wives or exclusively to mothers or to fathers or to brothers, that is, a sex-based classfication veterans' preference programs, and only those sort of program would be invalid.

Senator **Hatch**. I might add that my own State of Utah is one of the six States that has the same type of statute that was interpreted in the *Feeney* case.

What do you think about these questions that I have been asking, Mr. Phillips?

Mr. PHILLIPS. I've noticed that most male nonveterans express less resentment toward veterans because they are aware that somebody went in their place after being drafted and often paid a serious price for it. Thus, male nonveterans, who often avoided service through the student draft deferment, express generally less resentment toward veterans' programs than female nonveterans who accepted their own exemptions from the draft without a wimper.

Senator HATCH. Mr. Shanor, in the 1976 district court case of *Branch* v. *DuBois*, in 1976 the court found a veterans' preference of only 3.5 percent to be constitutional despite the fact that the court stated that it "hindered the advancement of women."

Under the ERA could any public policy which a court concluded "hinders the advancement of women" be upheld as constitutional? Could any policy which disadvantages women as a class be found to be valid?

Mr. SHANOR. Only if there is a compelling governmental interest.

Senator HATCH. You indicated in your own statement that there are very few compelling governmental interests of this magnitude.

Mr. SHANOR. If, as in *Branch*, there is an expressed distinction made between men and women under the ERA, that would be invalid.

Senator HATCH. Then the ERA would do away with that 3.5 percent advantage?

Mr. SHANOR. In fact, as you are no doubt aware with the development of middle tier scrutiny in the Supreme Court, even under the equal protection clause, it is quite likely that because of the closeness of the governmental interests that have to be shown under that middle-tier scrutiny, many veterans' preferences that are expressly based upon sex could be stricken down, even under the current equal protection clause.

Senator HATCH. I want to thank all four of you for your testimony today. Each of you has added to this hearing. You have been very helpful to the committee.

Thank you so much.

We will now turn to the additional witnesses. I would like the following to come up as a panel: the representatives of the Veterans of Foreign Wars, the American Legion, American Veterans Committee, the Vietnam Veterans of America, and the AMVETS.

We are happy to welcome each of you here today, and we look forward to hearing your testimony. I do hope you can summarize because I have another commitment that I need to keep.

We will put your complete written statements in the record as we will for all witnesses who have testified here today without objection.

Let us start with the Veterans of Foreign Wars representative, Mr. Donald Schwab.

STATEMENTS OF DONALD H. SCHWAB, DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES, ACCOMPANIED BY KIM GRAHAM, VETERANS OF FOREIGN WARS OF THE UNITED STATES; E. PHILIP RIGGIN, DIRECTOR, NATIONAL LEGISLATIVE COMMISSION, THE AMERICAN LEGION; JUNE A. WILLENZ, EXECUTIVE DIRECTOR, AMERICAN VETERANS COMMITTEE, ACCOMPANIED BY FRANK E.G. WEIL, COUNSEL; DENNIS K. RHOADES, VIETNAM VETERANS OF AMERICA; AND DAVID J. PASSAMANECK, NATIONAL LEGISLATIVE DIRECTOR, AMVETS

Mr. SCHWAB. Thank you, Mr. Chairman.

My name is Donald H. Schwab, and it is my privilege to serve the more than 1.96 million men and women of the Veterans of Foreign Wars as their national legislative director.

The gentleman on my left is Kim Graham, our employment specialist for our national veterans service.

Mr. Chairman, the Veterans of Foreign Wars currently has no resolution addressing a proposed equal rights amendment to the Constitution. We do have a vested interest in and very firm positions with respect to veterans preference, veterans benefits and no women in combat.

Senator HATCH. Could you elaborate further on this, please?

Mr. SCHWAB. We are in favor of retaining veterans' preference, all veterans' benefits, and excluding women from combat where they would have to close with the enemy.

Senator HATCH. OK.

Mr. SCHWAB. As previously stated, the president of the League of Women Voters in the House committee that ERA——.

Senator HATCH. Are you aware that almost every witness who has testified on the ERA has stated that women will be required to go into combat on the same basis as men if the ERA passes.

Mr. SCHWAB. Yes, sir.

Senator HATCH. In other words, language would need to be added to the equal rights amendment to protect the veterans' preference as well as to protect women from being compelled into combat before you could support it?

Mr. SCHWAB. That is absolutely right. Our commander in chief wrote to every Member of the House to that effect that it would have to be amended. Specifically, this article should not be construed to affect any benefit or preference given by the United States or any State to veterans and this article shall not be construed to require the assignment of women to military combat.

We have got to take the women activist groups at their word that they would attack veterans' preference and the Honorable James Sensenbrenner of the House Judiciary Committee, in correspondence with our executive director, stated, in part, "If what Ms. Ridings says is true, the same rationale which would overturn veterans' preference in public employment could be extended to prohibit veterans' preference in education and other areas." We have got to believe that that is a distinct possibility.

So as not to be redundant, Mr. Chairman, I will just say if the equal rights amendment is sent to the States for ratification that does not include the amendments we want, we will use every means in our power to defeat ratification in the States.

And just for the record, something came up about veterans' preference in promotion. Veterans' preference plays no part in promotion in Federal employment, and I will be happy to respond to any questions you may have sir.

[The following was received for the record:]

VETERANS OF FOREIGN WARS OF THE UNITED STATES

OFFICE OF THE DIRECTOR

STATEMENT OF

DONALD H. SCHWAB, DIRECTOR
NATIONAL LEGISLATIVE SERVICE
VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

WITH RESPECT TO A PROPOSED EQUAL RIGHTS
AMENDMENT TO THE CONSTITUTION

WASHINGTON, D. C FEBRUARY 21, 1984

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for the privilege of appearing before this distinguished Subcommittee to present the views of the Veterans of Foreign Wars of the United States.

My name is Donald H. Schwab, and it is my privilege to serve the more than 1.95 million men and women of the Veterans of Foreign Wars as their National Legislative Director.

Mr. Chairman, the Veterans of Foreign Wars currently has no resolution addressing a proposed Equal Rights Amendment to the Constitution. No doubt the voting delegates to our most recent National Convention were under the impression this matter had been laid to rest since the Equal Rights Amendment proposed by Congress on March 22, 1972, failed ratification by the requisite 38 states for adoption. Obviously, such is not the case. Notwithstanding, we do have a vested interest in and strong positions regarding veterans preference, veterans entitlements and no women in combat where they would be subjected to close combat with the enemy.

Mr. Chairman, when hearings were held by the appropriate subcommittee of the House Judiciary Committee on September 14, 1983, the President of the League of Women Voters stated in part, " . . . the broad veterans preference statute challenged in Massachusetts vs. Feeney, which granted an absolute lifetime preference to veterans seeking public employment in the Massachusetts Civil Service, would fall in a challenge under the ERA." Apparently, the dissenting opinion of

Mr. Justice Marshall, joined by Mr. Justice Brennan in the Supreme Court of the United States case, Personnel Administrator of Massachusetts et al vs. Feeney, would be used as the vehicle to challenge first the Massachusetts law and, then, having established a precedent, all other veterans preference laws. In addition, in correspondence with the Executive Director of our VFW Washington Office, Cooper T. Holt, the Honorable F. James Sensenbrenner, Jr., the Ranking Minority Member, Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, U. S. House of Representatives, opined, "If what Ms. Ridings says is true, the same rationale which would overturn veterans preference in public employment could be extended to prohibit veterans preference in education and other areas."

In view of the foregoing, the National Commander-in-Chief of the VFW, Clifford G. Olson, Jr., wrote to the Chairman and all members of the House Judiciary Committee and, then, all members of the House of Representatives that unless H.J. Res. 1 was amended, it would be wholly unacceptable to the more than 2.6 million men and women of the VFW and our Ladies Auxiliary. Specifically, Mr. Olson requested the legislation be amended as follows:

1. "This article shall not be construed to affect any benefit or preference given by the United States or any state to veterans," and
2. "This article shall not be construed to require the assignment of women to military combat."

Our position is unchanged and will remain so indefinitely.

As is a matter of record, Mr. Chairman, on November 15, 1983, H.J. Res. 1, proposing an Equal Rights Amendment to the Constitution failed passage in the House of Representatives. The vote was 278 yeas to 147 nays with one member voting "present" and nine not voting. The Speaker of the House brought the measure up under suspension of the rules which permitted no amendments and only 40 minutes of debate. This is a procedure normally used for non-controversial legislation and not something as far reaching as a proposed amendment to the Constitution.

Mr. Chairman, when veterans preference came under unprecedented attack in the House of Representatives in 1977, the hue and cry of women's activist groups was the same as it is today -- that they are second class citizens because their opportunity to acquire veterans preference was so limited that they face almost insurmountable obstacles in competing with veterans for federal employment. The fact is, Mr. Chairman, women never met their enlistment quotas during World War II, the Korean Conflict or Vietnam. However, women did serve during these periods of war or conflict. As a result, at that time there were enough women with veterans preference, 881.4 thousand, to fill nearly all the federal civil service jobs then held by women, 893.5 thousand. Some 577,000 women were entitled to veterans preference in their own right and 304.4 thousand women had derivative entitlement predicated upon death of the serviceman or the fact that the veteran was permanently and totally disabled due to service-connected causes.

How do women fare in federal employment today? Appended to my testimony, Mr. Chairman, is a chart prepared by the Office of Personnel Management for the fiscal year 1982, the most recent available. As indicated thereon, total federal hires were 367,000 and 168,456 or 46 percent, were women. Total veteran hires were 82,944 or 22.6 percent of total hires and 6,636 or eight percent, were women. Figures obtained from the Office of Personnel Management by telephone last week reveal:

1. There are presently 1,975,987 federal employees;
2. 1.2 million are men, of whom 726,272 or 36.5 percent of the total work force, enjoy veterans preference;
3. 776,000 are women, representing 39.2 percent of federal employees;
4. 44,997 women employees or 5.8 percent, enjoy veterans preference;
5. 16,117 employees are entitled to 10 point veterans' preference and 13,748 of these or 85.3 percent are women.

Therefore, Mr. Chairman, the thesis women are, in fact, suffering loss of federal employment because of veterans preference is without foundation.

With respect to no women in combat, we are, of course, very much aware that some women, particularly nurses, have been subjected to enemy fire. However, we must all hope that the United States of America never approaches such desperate straits that we must consider the training and assignment of women to ground, air and sea jobs which would require them to aggressively seek out, close with and destroy the enemy.

Mr. Chairman, if any proposed Equal Rights Amendment sent to the states for ratification is not amended as previously stated, I can assure you that the Veterans of Foreign Wars will use every resource at our disposal to defeat its ratification in every state.

It is inconceivable, Mr. Chairman, that women activists who enjoy freedom ensured by the sacrifices of veterans would now turn on their benefactors and seek to eliminate their benefits so dearly bought. Apparently, too many forget too soon the sacrifices that veterans made in giving years from their lives, years from their families and years from their personal endeavors if not, also, their physical or mental health.

Mr. Chairman, also appended to my testimony are the following resolutions passed by the voting delegates to our 84th National Convention held in New Orleans, Louisiana, August 12-19, 1983:

Resolution No. 444 -- "No Women in Combat Jobs"
Resolution No. 610 -- "Veterans Preference"

In conclusion, Mr. Chairman, and on behalf of the more than 2.6 million men and women of the Veterans of Foreign Wars of the United States and our Ladies Auxiliary, permit me to again thank you for your courtesy in inviting me to appear before you today.

SUMMARY OF SELECTED VETERAN HIRING INFORMATION

FISCAL YEAR 1982

FEDERAL HIRES

o Total	367,007
o Women	168,456 ✓
- % of Total	46%
o Minorities	94,688
- % of Total	26%

VIETNAM ERA VETERAN (VEV) HIRES

o Total	60,556
o Percent of Federal Hires	17%
o Percent of Veteran Hires	73%
o Disabled VEV Hires	7,327
- % of Total VEV's	12%

DISABLED VETERANS HIRES (10-POINT)

o Total	10,643
o Percent of Veteran Hires	13%
o Percent of Federal Hires	3%

Source: Office of Personnel Management
Central Personnel Data File

VETERAN HIRES

o Total	82,944
o Women	6,636
- % of Total	8%
o Minorities	19,658
- % of Total	24%
o Percent of Federal Hires	23%

VRA HIRES

o Total	15,017
o Women	1,412
- % of Total VRA's	9%
o Minorities	4,820
- % of Total VRA's	32%
o Disabled	1,821
- % of Total VRA's	12%
o Percent of Federal Hires	4%
o Percent of Veteran Hires	18%
o Percent of VEV's	25%

30 PERCENT OR MORE DISABLED VETERANS HIRES

o Total	3,369
o Percent of Veteran Hires	4%
o Percent of Total Disabled Veteran Hires	32%
o Temporary Appointments into the Competitive Service	1,648
- % of Total 30 Percent Hires	49%

Resolution No. 444

NO WOMEN IN COMBAT JOBS

WHEREAS, the present and projected strength of women in the Armed Forces is as follows:

	TOTAL STRENGTH	1982 WOMEN (ACTUAL) 10/31/82	1984 WOMEN (PROJECTED)
ARMY	780,300	73,983	93,000
NAVY	554,600	40,354	55,000
AIR FORCE	580,800	63,859	84,000
USMC	191,100	7,703	13,000
TOTALS	2,107,800	185,899 (including officers)	245,000 (including officers)

and

WHEREAS, the following additional factors apply: (1) the number of women in the Armed forces has more than quadrupled since 1972, from less then 2% of the total force to about 9.1%; (2) in 1972, 90% of the women in the Armed Forces were in "women type" jobs, today this percentage has shrunk to about 50%; (3) on December 20, 1977, the Secretary of the Army approved the assignment of women to "hazardous assignments near combat areas" to include approval of some "non-combat" positions in the 82nd Airborne Division (women are still not assigned to battalions or lower units in infantry, armor, cannon field artillery, combat engineers, Special Forces, low altitude air defense artillery, or attack helicopter units); (4) women comprise 26% of the ROTC force at 291 colleges, while 36,000 women are in Junior ROTC programs; (5) abroad, no other country, except New Zealand, has brought so many women into their Armed Forces. The Soviet Union has only 10,000 women in forces totalling over 4.6 million; Israel about 8,000 out of 278,000. In short, we are the only nation going this route; and

WHEREAS, (1) the presence of thousands of women in our Armed Forces and the prospect of many more thousands in the future, is a "quiet revolution" with profound implications for our national security; (2) the Congress has, predictably, done the easy thing -- women to West Point, down with the barriers, etc. -- without changing the basic law. A "woman in combat" bill has been stalled since 1974 in the House Armed Services Committee; (3) the most profound -- not narrowly military -- action representatives in government can do is to call upon its young citizens to fight and possibly die in defense of the nation or the nation's foreign policy objectives; (4) as structured today, should our Armed Forces be committed to action, women would be killed, wounded and captured in numbers that have no precedent in the history of the modern world; (5) the "turned on" young women in today's Armed Forces are proficient and admirable by every peacetime measurement. Many would fight bravely and effectively near the air, sea or ground battle zone; a truly heroic few could and would fight well in close combat with the enemy; but, (6) the Congress should be called upon to face up to the "no win" position they have placed the Armed Forces in (i.e., equal rights now, never mind the probable security and human cost), and codify, under the United States Code, the role the peoples' representatives desire American women to play in future combat (to its credit, the Reagan Administration has sharply questioned the numbers and the jobs of women in the services it inherited); now, therefore

BE IT RESOLVED, by the 84th National Convention of the Veterans of Foreign Wars of the United States, that the position of the VFW on this question before the Congress and the Executive Branch will be: No women will be assigned to ground, sea, or air jobs that call for aggressively seeking out, closing with, and destroying the enemy; and

BE IT FURTHER RESOLVED, that the position of the VFW on this question be expanded before Congress and the Executive Branch to remand the Congress of the United States to provide all branches of the Armed Forces with the necessary exemption regarding job placement equality to insure that: No women will be trained for, or assigned to, ground, sea, or air jobs that could call for aggressively seeking out, closing with, and destroying the enemy.

Resolution No. 610

VETERANS' PREFERENCE

WHEREAS, the 78th Congress passed the Veterans' Preference Act of 1944 in June, the month allied armed forces made the Normandy landings at tremendous human cost; and

WHEREAS, the term "veteran" includes every category of society, sex, age, religion, ethnic group, race, and creed; and

WHEREAS, Section 712 of the Equal Employment Act of 1972 specifically states that nothing in the Act shall be construed to repeal or modify any Federal, State, Territorial or Local laws creating special rights or preference for veterans; and

WHEREAS, during the past three generations, the United States has become involved in World War II, Korea, and Vietnam; those who served on active duty during these three armed conflicts at the very least experienced a disruption in life style, generally from two to four years at very low pay and at worst were disabled or killed; and

WHEREAS, the Veterans' Preference Law accomplished the legislative purpose of honoring veterans and provides a small advantage to competing for federal and public employment; now, therefore

BE IT RESOLVED, by the 84th National Convention of the Veterans of Foreign Wars of the United States, that we reaffirm our traditional policy and hereby strenuously oppose any and all attempts to weaken or destroy veterans' rights and preference in federal and public employment; and

BE IT FURTHER RESOLVED, that the President and the Congress of the United States reject any and all proposed legislation or regulatory change that would reduce employment opportunities for veterans in the federal and public workforce.

Adopted by the 84th National Convention of the Veterans of Foreign Wars of the United States held in New Orleans, Louisiana, August 12-19, 1983.

Resolution No. 610

Senator HATCH. Thank you.

Let us turn to the American Legion, and Mr. Philip Riggin.

STATEMENT OF E. PHILIP RIGGIN

Mr. RIGGIN. Good morning, Mr. Chairman.

My name is Philip Riggin. I am legislative director of the American Legion, sir, and I appreciate the opportunity to be here and to offer a summary of testimony on behalf of the American Legion.

The American Legion as a wartime veterans organization does represent, obviously, wartime veterans and such veterans constitute a class of individuals unlike any other differentiated class. This is because veterans were exclusively created by actions of the Federal Government.

As we understand it, the view that a constitutional challenge would end veterans' preference if ERA is adopted stems from a prediction that the definition of discrimination may change. Currently, the test for discrimination requires the presence of intent to discriminate. Some say if ERA is adopted there will be an effort undertaken where the intent test, so to speak, would be replaced by an effect or impact test. Accordingly, even if Congress never intended to discriminate against women when it approved veterans' preference, the fact that a preponderance of veterans are males constitutes the same effect and must therefore be unconstitutional discrimination.

There is no doubt that the Veterans Preference Act of 1944 represents one of the fundamental elements of veterans benefits.

Veterans' preference was and continues to be regarded as a clear policy statement by Congress. Specifically, veterans were to receive priority in Federal employment because of their wartime sacrifices and because the normal course of their civilian lives was interrupted by the Nation's call to arms.

Despite the establishment of employment priority, however, veterans' preference in Federal employment is not absolute. At present, veterans' preference affords assistance to wartime veterans on entry into Federal service and affords protection to wartime veterans during reduction in force action.

Veterans' preference in Federal service has no bearing on promotions or career advancement, no direct bearing. Likewise, it does not extend to the senior executive service, excepted positions such as doctors or lawyers, or temporary or seasonal employment.

In fact, the Civil Service Reform Act of 1978 imposed even greater restrictions on veterans' preference than had been previously in existence.

Mr. Chairman, were it not for the predictions of several legal scholars that veterans' preference would be held discriminatory if ERA is adopted, the American Legion would have no purpose in participating in today's hearing. This, quite simply, is because the Legion has no nationally mandated position to express on ERA, favorable or otherwise. It is significant, however, to note that the American Legion since its inception has not only permitted but has encouraged membership by women veterans.

Because of these legal predictions and because of our belief in veterans' preference we have no choice but to urge this committee and Congress in the strongest possible terms to add specific language to the ERA resolution, language which would offer protection for veterans' preference.

As defenders of the readjustment interests of the Nation's wartime veterans, we are simply unwilling to leave their economic fate to chance. If veterans' preference was ultimately found unconstitutionally discriminatory against women, we, as a society, would have a difficult time reconciling that with the fact that men have primarily been called upon in all of our past wars. In Vietnam alone some 57,000 men died. Sexual discrimination that results from veterans' preference is a result of this long history of male service in the military.

Mr. Chairman, this summarizes my statement. I will be happy to respond to any questions.

[The following was received for the record:]

Statement of

The American Legion

1608 K STREET, N. W.
WASHINGTON, D. C. 20006

by

E. PHILIP RIGGIN, DIRECTOR
NATIONAL LEGISLATIVE COMMISSION
THE AMERICAN LEGION

THE EQUAL RIGHT AMENDMENT AND VETERANS PREFERENCE

FEBRUARY 21, 1984

Mr. Chairman and members of the Subcommittee:

The American Legion appreciates this opportunity to present its views before you today. At issue are several questions associated with what if any effects on state and federal veterans preference statutes would apply if the Equal Rights Amendment (ERA) is added to the United States Constitution.

As war time veterans we constitute a class of individuals unlike any other differentiated class. This is because veterans were exclusively created by actions of the federal government.

As we understand it, the view that a constitutional challenge would end veterans preference if ERA is adopted stems from a prediction that the definition of discrimination may change. Currently, the test for discrimination requires the presence of intent to discriminate. If ERA is adopted, it is said, the intent would be replaced by an effect test. Accordingly, even if Congress never intended to discriminate against women when it approved veterans preference, the fact that a preponderance of veterans are males constitutes the same effect and must therefore be unconstitutional discrimination.

Mr. Chairman, given the predictions of several legal scholars, it may be that veterans preference might be found discriminatory if ERA in its present form is added to the constitution. Because of the importance of veterans preference as a principle, it deserves some historical treatment for background purposes.

There is no doubt that the Veterans Preference Act of 1944 represents one of the fundamental elements of veterans benefits. It is designed to provide an eligible veteran with a hand up, not a hand out, for the sacrifice made for his country. We can trace a form of veterans preference back to this nation's beginnings when military service counted favorably in the selections of officials and subordinate employees in the customs service. However, it was not until 1865 that Congress enacted legislation that provided preferential appointment to civil offices for those veterans honorably discharged as a result of wounds or sickness.

Congress subsequently expanded this limited preference in 1876, in 1912 and again in 1919 with the Census Act. It was not until World War II, however, that the most dramatic change in veterans preference came about.

Veterans preference was and continues to be regarded as a clear policy statement by Congress. Specifically, veterans were to receive priority in federal employment because of their war time sacrifices and because the normal course of their civilian lives was interrupted by the nation's call to arms.

Even in 1944, as now, veterans preference was challenged. Then, the Civil Service Commission opposed an absolute preference for all veterans in all federal positions as being inconsistent with a merit system, even though it agreed with veterans preference in principle. As a result, then as now, veterans preference in federal employment is not absolute.

At present, veterans preference affords assistance to war time veterans on entry into federal or state service and affords protection to war time veterans during Reduction In Force

(RIF) actions. Veterans preference has no bearing in promotions or career advancement. Likewise it does not extend to the Senior Executive Service, excepted positions such as doctors or lawyers, temporary or seasonal employment or even in abolition of function such as when one agency's functions are absorbed by another. In fact, since the Civil Service Reform Act of 1978 (5 USC 2108), no veteran with 20 or more years of military service, no veteran discharged after October 14, 1976 and no veteran discharged from military service with the rank of major or above is covered by veterans preference.

Perhaps, the strongest statement regarding the legitimacy of veterans preference was made when the constitutionality of a Massachusetts veterans preference statute was upheld by the Supreme Court in PERSONNEL ADMINISTRATOR OF MASSACHUSETTS VS. FEENY 442 US 256 (1979).

Mr. Chairman, were it not for the predictions of several legal scholars that veterans preference would be held discriminatory if ERA is adopted, The American Legion would have no purpose in participating in today's hearing. This, quite simply, is because the Legion has no nationally mandated position to express on ERA, favorable or otherwise. It is significant, however, to note that The American Legion since its inception has not only permitted but has encouraged membership by women veterans.

However, because of these legal predictions and because of our belief in veterans preference we have no choice but to urge this Committee and Congress in the strongest possible terms to add specific language to the ERA resolution shielding veterans from any potential court decision holding veterans preference or veterans programs unconstitutional.

As defenders of the readjustment interests of the nation's war time veterans, we are simply unwilling to leave their economic fate to chance. If veterans preference was ultimately found unconstitutionally discriminatory against women we, as a society, would have a difficult time reconciling that with the fact that men have primarily been called upon in all of our past wars. In Vietnam alone some 57,000 males died. Any sexual discrimination that results from veterans preference is a result of this long history of male service in the military.

Mr. Chairman, that concludes our statement.

Senator HATCH. Let me ask you the same two questions. Do you need an explicit exception in the ERA to protect the veterans' preference? Further, are you opposed, as a general proposition, to women being forced into combat on an equal basis with men?

Mr. RIGGIN. There is no reference in this particular statement regarding women in combat.

Senator HATCH. Where would the American Legion stand on that question?

Mr. RIGGIN. We would probably be against women in combat from a military managerial standpoint.

Senator HATCH. What about the veterans' preference? Would we have to amend the equal rights amendment on the floor in order to protect the preference?

Mr. RIGGIN. We believe so. We obviously were sitting in the room awhile ago when the discussion of this was taking place earlier, and we believe that there will probably be some language necessary in the equal rights amendment, in any equal rights amendment that passed the Congress, to protect existing veterans' preference statutes or any other veterans' benefits programs which may be considered discriminatory.

Senator HATCH. Thank you.

Let us go to the American Veterans' Committee, and Ms. June Willenz.

STATEMENT OF JUNE A. WILLENZ

Ms. WILLENZ. Thank you, Mr. Chairman.

The American Veterans' Committee thanks you for the opportunity to present our views on the ERA and veterans' preference.

Senator HATCH. We are happy to have you here.

Ms. WILLENZ. I would like to introduce the chairman of our Veterans Affairs Commission, Mr. Frank Weil.

Senator HATCH. It is good to have you here, Mr. Weil.

Ms. WILLENZ. I will submit my prepared statement for the record, Mr. Chairman, and try to summarize it.

Senator HATCH. Without objection, we will place it in the record.

Ms. Willenz. Let me first say that AVC strongly supports the adoption of the ERA as part of the U.S. Constitution. We believe that gender ought not to be the basis of any laws, regulations, or actions by any government or agency of government.

Second, AVC does not approve the kind of veterans' preference embodied in the *Feeney* case. That statute provided a total, lifetime, across-the-board preference in public employment for veterans over all nonveterans.

What we believe in is that veterans point preference in the civil service for nondisabled veterans should be limited to the initial appointment only and that no person should receive a position unless fully qualified to perform the duties involved.

Let me also refer to the basis for veterans' benefits. We suggest that two basic standards should be applied. In case of death or disability incurred in military service, are the benefits sufficient to provide a decent standard of living for the veteran, his family, or survivors?

For all veterans, are the benefits so designed as to enable a readjustment from military service to civilian life with a minimum of economic loss?

Let us not forget that the major purposes of veterans' benefits programs have been the reintegration and the rehabilitation of veterans back into civilian life.

Another point must be noted. There is an increasing number of women participating in the military. Today there are over a million living women veterans who are eligible for veterans' preference. They represent 4.1 percent of all living veterans. Furthermore, more and more women are entering the military service.

I might say that AVC has been working very hard to see that all barriers to military service are eliminated. We have supported and we continue to support the end of the barriers embodied under 10 U.S.C. 6015 and 8595 which deny women access to all units of the military forces.

We see no conflict between ERA and the type of veterans' preference which we support. The basic objective of such veterans' preference is to facilitate readjustment to civilian life as I pointed out.

The distinction, we must remember, is between veterans of either sex as compared to nonveterans of either sex, not between males and females. The ERA would forbid Federal and State governments from denying or abridging equality of life on account of sex. Hence, there would be no conflict between ERA and a veterans' preference statute that rests on the distinction between veterans and nonveterans and is not intended principally to discriminate in favor of one sex as against the other.

Regarding the *Feeney* case, the Court's opinion, noting that the statute was neutral on its face as to gender, ruled that its principal distinction was between veterans of either sex and nonveterans of either sex, not between males and females as such.

The ERA is directed against Government action that denies equality of rights on account of sex. The veterans' preference laws, as the Supreme Court stated in the *Feeney* case, are not based on a distinction "that can plausibly be explained only as a gender-based classification." In light of the history and purpose of veterans' preference laws, the continually increasing role of women in the military and as veterans, and the different directions in which the veterans' preference laws and the ERA are focused, we believe that the ERA would not invalidate veterans' preference laws generally.

AVC strongly favors the adoption of ERA. We see no basis for suggesting that ERA would invalidate the general principle of veterans' preference laws. We also believe that an initial appointment veterans' preference is justified and is part of the Nation's obligation to its veterans. It is a disservice to both the veterans and the women of this country to suggest that there is a conflict between ERA and veterans' preference when there is none.

Thank you for the opportunity of presenting the American Veterans' Committee views.

[The following was received for the record:]

STATEMENT OF THE AMERICAN VETERANS COMMITTEE

Before the Subcommittee on the Constitution of the Senate Judiciary Committee on ERA and Veterans Preference

February 21, 1984

Mr. Chairman and Members of the Subcommittee:

The American Veterans Committee thanks you for the opportunity to present our views on whether ERA would have any impact on veterans preference.

My name is June A. Willenz. I am the Executive Director of the American Veterans Committee and have served in that capacity for over 18 years. I am also a member of the VA Advisory Committee on Women Veterans which was established by VA Administrator Harry Walters in June 1983, and statutorily established by PL 98-160 in November 1983. I authored the book *Women Veterans: America's Forgotten Heroines*, which summarizes the role of women in the military and as veterans.

Before turning to the subject before this Subcommittee I would like to acquaint you with the American Veterans Committee's positions on the ERA and on the issue of veterans preference in public employment.

First. AVC strongly supports the adoption of the ERA as part of the United States Constitution. We believe that sex discrimination ought not to be the basis for laws, regulations, or actions by any government or agency of government.

Second. AVC does not approve the kind of veterans preference embodied in the statute involved in the case of *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256 (1979). That statute provided a total, lifetime, across-the-board preference in public employment for veterans over all non-veterans. Our position as expressed in our National Platform is as follows:

AVC Veterans Affairs Platform

(1) Compensation

For many years, AVC has pointed out the need for a thorough review and reappraisal of this Nation's policies on veterans as follows:

1. We oppose bonuses and general pensions as being class legislation unrelated to the real need of individual veterans and tending to set veterans apart from their fellow citizens.

In the matter of benefits, two basic standards should be applied:

a. For death or disability incurred in military service: Are the benefits sufficient to provide a decent standard of living for the veteran, his family or survivors?

b. For all veterans: Are the benefits so designed as to enable a readjustment from military service to civilian life with a minimum of economic loss?

Since benefits are a Federal responsibility, uniform standards of administration and compensation should be applied nationally without regard to race, creed, color, sex, national origin, handicap, age, or religion.

(4) Civil Service

AVC believes that veterans point preference in the civil service for non-disabled veterans should be limited to the initial appointment only, and that no person should receive a position unless fully qualified to perform the duties involved.

AVC National Affairs Platform

5. B. The rights granted to veterans in the Veterans Preference Act in regard to discharge procedures and appeals should be extended to all Government employees except those in probationary status.

Third. It should be noted that there are 1,150,000 living women veterans who are eligible for veterans preference. They represent 4.1% of all living veterans. Furthermore, more and more women are participating in the military services, almost 200,000 at the present time. That participation, approximately 8% of the armed forces, is expected to continue to increase. The fastest growing part of the veterans population is the female component.

The most recent VA statistical report on "The Female Veteran Population" (November 1983) pointed out that the increase in the female veterans population "represents an upward trend not characteristic of the male veteran population." Therefore, we can expect an even greater number of women veterans will become eligible for veterans benefits, including veterans preference.

Another fact sometimes overlooked in discussions of veterans preference is that women survivors of veterans who were eligible for veterans preference--widows, and in some cases, mothers--all women--under the current Veterans Preference Law are also eligible for veterans preference. A substantial and growing number of women, therefore, are and will be eligible for veterans preference.

We see no conflict between the ERA and the type of veterans preference which we support. The basic objectives of such veterans preference are to facilitate readjustment from military service to civilian life with a minimum of economic loss or hardship, and, in the case of disability or death in military service, to provide a decent standard of living for the veteran and/or the veteran's family or survivors. Even though more males then females become veterans, the objective of the benefits granted to them is to benefit veterans of either sex, rather than to benefit males in a manner superior to, or to the exclusion of, females. The distinction drawn is between veterans of either sex as compared to nonveterans of either sex, not between males and females as such.

ERA would forbid Federal and state governments from denying or abridging "equality of rights...on account of sex." Hence, there would be no conflict between the ERA and a veterans preference statute that rests on the distinction between veterans and nonveterans and is not intended principally to discriminate in favor of one sex as against the other sex on the basis of sex.

The question as to whether the ERA would invalidate a statute like the Massachusetts statute involved in the Feeney case requires further analysis. That statute gave every honorably discharged veteran, "male or female, including a nurse," who had at least 90 days active military service of which at least one day was in "wartime," and who qualified for a state civil service position, a preference ahead of all qualifying nonveterans. Since most veterans are male, the result of that total, across-the-board, preference was that most of the state civil service senior positions were occupied by males. Ms. Feeney, a female nonveteran with 12 years civil service tenure who attained high grades in open competitive civil service examinations for higher positions, was unable to obtain them because veterans with lower, but qualifying, civil service test grades were given preference ahead of her. She challenged the statute as denying her equal protection of the laws under the Fourteenth Amendment of the United States Constitution because the statutory preference resulted in the better civil service positions being filled principally by men and excluding most women from those positions.

The Supreme Court's opinion, starting from the premise that "any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment," reaffirmed "the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results."

(256 U.S., at p. 273). The Court's opinion, noting that the statute was neutral on its face as to gender, ruled that its principal distinction was between veterans of either sex and nonveterans of either sex, not between males and females as such, and that its purpose was to benefit veterans rather than to discriminate against women, and therefore ruled against Ms. Feeney's Equal Protection clause challenge.

It is clear that the Court was influenced by the long history of veterans preference legislation. Indeed, in the recent case of *Regan, Secretary of the Treasury* v. *Taxation with Representation* (May 23, 1983), the Court upheld the validity of a tax benefit given to veterans organizations but not to other charitable or educational organizations, and stated (p. 10, slip copy), citing the *Feeney* opinion:

> Our country has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages. This policy has "always been deemed to be legitimate." *Personnel Administrator* v. *Feeney*, 442 U.S. 256, n. 25 (1979).

The Feeney decision follows the pattern of *Washington* v. *Davis*, 426 U.S. 229 (1976) which held that "a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact; instead the disproportionate impact must be traced to a purpose to discriminate on the basis of race."

AVC has particularly worked diligently to help expand the numbers and role of women in military service. As we have pointed out, increasing numbers of women are serving in the military and are becoming veterans, entitled equally with male veterans to the benefits of veterans preference. That should be the focus for those who, like AVC, seek to eliminate sex discrimination in all aspects of daily life, rather than to invalidate laws, which, like the Federal and certainly most state veterans preference laws, are directed, not toward discriminating against women as such, but rather to benefit veterans of either sex.

The ERA is directed against government action that denies equality of rights "on account of sex." The veterans preference laws, as the Supreme Court stated in the *Feeney* case (at p. 275), are not based on a distinction "that can plausibly be explained only as a gender-based classification.". In the light of the history and purpose of veterans preference laws, the continually increasing role of women in the military and as veterans, and the different directions in which the veterans preference laws and the ERA are focussed, we believe that the ERA would not invalidate veterans preference laws generally. This does not mean that it would not invalidate a law which is directed to the discriminatory purpose of harming or disadvantaging women as against men through the guise of a "veterans preference" law that is not properly related to the purpose of aiding veterans in relation to their military service and their veterans status.

As stated above, AVC strongly favors the adoption of the ERA. We see no basis for suggesting that ERA would invalidate the general principle of veterans preference laws. We also believe that an "initial appointment" veterans preference is justified and is part of the obligation this nation owes its veterans. It is a disservice to both the veterans and women of this country to suggest that there is any conflict between ERA and veterans preference when there is none.

Thank you for the opportunity to present the views of the American Veterans Committee.

NATIONAL WOMAN'S PARTY
SEWALL BELMONT HOUSE
144 [illegible] NE [illegible] DC 20002 [illegible]

April 4, 1984

FOUNDER
[illegible]
COUNCIL MEMBERS
[illegible]
ADVISORY COMMITTEE
[illegible]

June A. Willenz
Executive Director
American Veterans Committee
1346 Connecticut Avenue, NW
Suite 930
Washington, D.C. 20036

Dear Ms. Willenz:

The National Woman's Party wishes to commend you, Mr. Weil, and the American Veterans Committee for the fine testimony you gave at Senator Hatch's hearing in February in support of the Equal Rights Amendment.

We are aware that many of the veterans organizations panel members expressed hostility to the concept of ERA and to women's organizations in general. We do, indeed, appreciate the American Veterans Committee commitment to fairness for both men and women, and the judicious language conveyed in your testimony.

The National Woman's Party was founded in 1913 by Alice Paul, suffragist and author of the Equal Rights Amendment in 1923. We do not believe that the ERA will eclipse all veterans benefits, nor do we believe that the men and women of American who support the ERA would want deserving veterans to be deprived of their just benefits. Most women who support ERA also appreciate and are proud of those men and women who serve our country both in combat and in other ways.

Thank you.

Sincerely,

Elizabeth L. Chittick
President

ELC:s/

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Senator HATCH. Thank you. Let me just ask you one question. You indicate that you do not think that the ERA will interfere with present veterans' preference laws but you are not sure.

Would you favor, as these other veterans organizations do, amending ERA so that we explicitly make clear that the ERA does not affect veterans' preference laws?

Ms. WILLENZ. No, we would not go in that direction, Senator Hatch.

Senator HATCH. Why not? Why would you not want to make it clear?

Ms. WILLENZ. Because, first of all, we do not think that there is a conflict.

Senator HATCH. But you do not know.

Ms. WILLENZ. Well, none of the constitutional lawyers know. They can only suggest and they can only infer from the past.

Senator HATCH. Most of the proponents of the ERA concede that it will substantially affect veterans' preferences. It is not simply ERA opponents.

Ms. WILLENZ. Well, I will turn to my counsel on this particular question.

Mr. WEIL. Mr. Chairman, we believe that the distinction would be made on intent. Now, we also believe that putting an exception to ERA is likely to severely limit its chances of passage. We believe that the intent is already spelled out in the veterans' preference law and Congress could quite easily add a statement of intent to those laws which have a different impact to make clear that the purpose of veterans' preference laws is rehabilitation and not discrimination.

So I believe that an ERA without an amendment stands a greater chance of passage and that the intent behind the veterans' preference laws is already well set out and could be strengthened more easily than ERA could be passed with an amendment in it.

Senator HATCH. You indicate in your statement that "We see no conflict between the ERA and the type of veterans' preference which we support." I take it then that you do see a conflict between the ERA and present veterans' preference programs such as those in the *Feeney* case which you clearly do not support. Am I correct in that?

Mr. WEIL. We take no position on the latter. In our opinion the Court ruled correctly. Now, a different Court with reappointments by the present administration might rule differently.

We simply take no position on the absolute veterans laws. We see no conflict between the ERA and rehabilitative veterans' preference.

Senator HATCH. I see. You conclude in your statement that the ERA would invalidate laws directed toward "harming or disadvantaging" women but which are in "the guise of a veterans' preference law."

Now, how is this distinction going to be drawn by the courts in these cases? Which ones are merely a guise?

Ms. WILLENZ. Well, if there was a veterans' preference law that specifically included only, for example, a certain group of combat veterans which, by definition, excluded all women, in other words, gender discriminatory, in that kind of instance ERA would probably have an impact. And that is the kind of situation where we feel there is a distinction to be made.

Senator HATCH. What would the paralyzed veterans think about that particular statement?

Ms. WILLENZ. We do not include any disabled veterans in our discussion of veterans preference. We make a distinction between five-point preference eligibles and the disabled always.

Senator HATCH. So you would want the veterans preference to continue with regard to the disabled?

Ms. WILLENZ. Certainly, and that is one of the major reasons for having veterans preference which is to provide that decent standard of living for all those who served and were injured in the service of their country.

Senator HATCH. Then you disagree with the National Organization of Women on that particular point?

Ms. WILLENZ. I am not that familiar with that position.

Senator HATCH. According to a resolution enacted in 1975, the National Organization for Women opposes any State, Federal, county or municipal employment law giving special preference to veterans.

Mr. WEIL. We would disagree with that definition of their point of view. The National Organization for Women, of course, is totally civilian oriented.

Senator HATCH. I understand, but you would disagree with that resolution.

Mr. WEIL. We disagree with extending it that far.

Senator HATCH. Since many assume that NOW representatives are authorities on what the equal rights amendment means, why would you oppose adding specific language to make it clear that all veterans' preference laws would not be unconstitutional.

Mr. WEIL. We are all political animals, Mr. Chairman, and we believe that putting in the specific language is likely significantly to decrease the chances of passage of that amendment.

Senator HATCH. What if the ERA passes and works to disadvantage the handicapped and disabled veterans?

Mr. WEIL. Mr. Chairman, we believe that the more extreme advocates of ERA are fighting strawmen. They are fighting possibilities of their own creation.

Senator HATCH. This concern has been raised by others who do not consider themselves extreme advocates of the ERA. Many are proponents.

Mr. WEIL. I believe the mainstream of the proponents of ERA would probably not take their view quite as far.

Senator HATCH. But that is my point. I believe there are many sincere people supporting the equal rights amendment who are not sure what it means. When you consider that many of the advocates who claim to know what it means expressly state that it will outlaw the veterans' preference laws of this country, it seems to me that it makes good sense to add language that would guarantee that certain veterans' preference rights would not be abolished.

Mr. WEIL. Senator, if I thought that the chances of passage were equal with and without the amendment, I would favor that amendment as well.

Senator HATCH. So you are willing to risk the loss of all veterans' preference rights in your determination to have the equal rights amendment passed?

Mr. WEIL. No, Senator, because I do not believe there is a risk of losing all rehabilitative veterans' preferences and veterans' preferences tied to disability.

Senator HATCH. But you admit there is a possibility that that will occur?

Mr. WEIL. We do not believe it will.

Senator HATCH. You do not believe.

Ms. WILLENZ. Mr. Chairman, we heard two constitutional lawyers who suggest that this may not be the case at all.

Senator HATCH. Among the ERA proponents who testified earlier, one of them said that a diminution of veterans' preferences will likely occur and that he welcomes it. The other one said there is a real possibility it will occur depending upon the legal standards employed by the courts.

Ms. WILLENZ. Under certain circumstances, but——

Senator HATCH. That is what I am saying, too.

Ms. WILLENZ. If a veterans preference law were specifically intended to discriminate against women because no women at all were included in that class, then ERA would probably pull down that kind of law.

But I am sure you would not be in favor of any kind of law that would discriminate against all women as a class so that is the only place where ERA would absolutely invalidate a veterans' preference law, unless things change considerably.

Senator HATCH. You are assuming that the intent standard will be maintained, and the overwhelming number of witnesses have indicated that there is a good possibility it may not be maintained.

Mr. WEIL. Senator, I think what would be applied is roughly the same standard as now is applied, let us say, under title VI. First, you ask whether there is a differential adverse impact. If there is, you ask whether there was discriminatory intent, and if so, it falls.

If there was no discriminatory intent, you look and find out what was the purpose. Was there legitimate purpose? If there was a legitimate purpose, you look to see whether that same purpose can be achieved in a nondiscriminatory or significantly less discriminatory manner. If it can be, then it is only the achieving of this legitimate objective in a nondiscriminatory manner which can stand.

Let us say you find a disproportionate number of minorities being served by some HHS program. You then look, to see whether there discriminatory intent. If there is, you strike down the distinction. If there is no such intent, you ask why is this program carried out in such a manner.

If we are told a legitimate reason why, then the analysis, is: is there a less discriminatory or nondiscriminatory way of carrying out this intent in this program. If there is, it stands. If there is not, it falls.

I think the same analysis would be applied to situations that impact differentially on either sex.

Senator HATCH. You state that "There would be no conflict between the ERA and a veterans' preference statute that rests upon the distinction between veterans and nonveterans and is not intended principally to discriminate in favor of one sex as against the other sex."

Can I conclude from this comment that you believe that discrimination will be identified under the ERA on the basis of whether or not there existed an intent to discriminate as opposed to the mere existence of a disparate impact between men and women?

Mr. WEIL. There is an additional wrinkle. If there was no intention to discriminate and a disparate impact results, the next question is, is there a way of achieving the objectives in a nondiscriminatory or significantly less discriminatory manner. If so, then the preferences would be illegal under the ERA. This would occur only if the legitimate objective reintegration of the nondisabled veterans into civilian life could be accomplished in a manner having a lesser differential impact.

Senator HATCH. I see.

Ms. WILLENZ. Mr. Chairman, may I add one other comment? And that is, one of the problems with adding an amendment is that if you introduce one amendment like this, it is very likely that more and more amendments would be offered.

Senator HATCH. Not necessarily. You have many veterans organizations representing millions of veterans saying, "Look we are not taking a position for or against the equal rights amendment; if we can have this matter clarified and if we can expressly state this in the amendment so that there is no question about it, then we will not be against it. But if there is no clarification in there, we are going to be against it."

Now, it seems to me if you are a proponent of the equal rights amendment, you would be interested in resolving that issue, unless you believe that all veterans preference should be outlawed or abolished. There is enough authority on this matter to suggest that they will be abolished that we ought to clarify that issue.

Ms. WILLENZ. Well, we disagree with you that there is enough evidence that it would be abolished. I think there is enough differences among the legal experts to——

Senator HATCH. Indeed, I do not think there are that many differences.

Ms. WILLENZ [continuing]. To substantiate that.

Senator HATCH. Let me read Barbara Brown who is an authority on it:

> While it is valid for the State to take steps to reintegrate veterans into civilian society, a rule giving them absolute preference over all qualified women applicants for State employment is unacceptable under the ERA.

The California Commission on the ERA said:

> An alternative to abolition of veterans preferences under the ERA which might be consonant with the ERA would be to extend veterans preference to any veteran and his or her spouse. This would lessen its discriminatory impact.

Dorothy Ridings, League of Women Voters, has said:

> The broad veterans preference statute as in *Massachusetts* v. *Feeney*, which granted an absolute lifetime preference to veterans seeking public employment in Massachusetts civil service would fall in a challenge under the ERA.

The congressional women's caucus has stated:

> Programs to reward our veterans reentering the workforce would have to be more narrowly tailored and carefully weighed against the ERA's probition against sex discrimination so as not to unduly limit employment opportunities for women.

Prof. Ann Freedman of Rutgers, considered one of the authorities, stated:

> The dissent's analysis in *Feeney* of the veterans preference statute illustrates the approach required by the ERA.

The National Organization of Women opposes any State, Federal, county, or municipal employment law giving special preference to veterans.

Mr. WEIL. Excuse me, Senator. Everything you have read up to but not including the last statement says that more narrowly tailored, rehabilitative is OK, absolute is not.

Senator HATCH. That is not the way I read it.

Mr. WEIL. That is precisely our point. It would need to be looked at more thoroughly. That is precisely our position. We only disagree with the NOW statement which goes against all veterans' preferences.

All of the others we agree with they confirm that there is no conflict between the ERA on one side and a properly tailored veterans' preference on the other.

Senator HATCH. Now, assuming that you are right, assuming that you are right and you can find a properly tailored veterans' preference, what is a properly tailored veterans preference? Give us illustrations of what is right and what is wrong. Apparently you are saying the absolute veterans' preference that is the present law in many areas is wrong.

Mr. WEIL. We would say a veterans' preference——

Senator HATCH. Who makes the decision? That is one of the important issues.

Mr. WEIL. Ultimately the courts will in any case.

Senator HATCH. The courts will make these decisions. Up to now the legislature has been making these decisions.

Mr. WEIL. All right. I would recommend the legislature approve veterans' preference schemes that allow for an initial preference to reintegrate veterans into the civilian work force for a certain number of years after discharge, perhaps with a provision that if, because the veteran is too disabled, this could be transferred to a member of the family who is able to work, without making a distinction as to the gender of that member of the family.

That would probably be perfectly all right under ERA, and it would achieve the intent which is to help reintegrate the veteran into society and to give the disabled veteran a preference on account of his disability, not on account solely of his veteran status.

Senator HATCH. That is what you would recommend, but what are the courts likely to do? That is the issue here.

Mr. WEIL. We are not only recommending it, Senator. Insofar as one can predict at all, we are predicting that this is what the courts would uphold.

Senator HATCH. You do not have many who would support you on that issue, I am afraid to say.

Let us turn to the Vietnam Veterans of America.

STATEMENT OF DENNIS K. RHOADES

Mr. **Rhoades**. Thank you, Mr. Chairman.

I am Dennis K. Rhoades, executive director of Vietnam Veterans of America. I am going to briefly summarize my statement since it appears that we are running a little short on time.

Vietnam Veterans of America held their first national convention last November, and as a result of a resolution voted out of our economic committee, we came out in full support of all Federal, State, and local veterans' preference systems.

At the same convention, introduced from the floor, was a resolution in support of ERA that was also passed by the convention.

VVA believes that veterans' preference and ERA can exist side-by-side provided certain things happen in the process of passage. We are affirmatively in favor of veterans' preference. We believe that above all there is a social contract between the Federal Government, State, and local governments if they so choose, and the veteran which should not be abrogated, and that includes not only veterans' preference but the whole system of rights and benefits to which the veteran is entitled.

We believe that in no case should veterans who went into military service and got out find that somehow the Government is not going to keep its promise.

We do not necessarily believe that there is a natural conflict between ERA and veterans' preference. It has been suggested, for example, that the 1979 Supreme Court decision in *Feeney* v. *Massachusetts* might have been resolved differently, and I think that was pretty much what we heard here today.

We are concerned about statements from, for example, the president of the League of Women Voters about the *Feeney* case, and we are also concerned about the resolution of the National Organization of Women calling for the elimination of all veterans' preference.

We believe that veterans' preference and entitlements are an earned right. We believe that the ERA should not become a vehicle for undermining those rights that men and women who served in the military earned as a result of their service.

Nor, would I add, would we recommend that the integrity of the ERA be encroached because of misperception that ERA and veterans' preference are necessarily mutually exclusive.

Now, we have had discussions with many of our members concerning reconciling ERA and veterans' preference. Some of our members have suggested, as has been suggested here, that ERA should be amended, and they will probably seek to introduce that issue at our next convention.

Our legal counsel has advised us that there may be another way. In constitutional issues the courts examine the legislative history for the intent of Congress much as they do the statutes.

We therefore believe that an unequivocal expression of congressional intent that ERA should in no way interfere with the rights, benefits, and preferences established for veterans by Federal, State, and local governments would be sufficient to protect the system of compensatory programs established in recognition of military service.

Senator **Hatch**. Let me interrupt you on that point. A lot of the testimony we have received, even here today, indicates that there is just no way we could ever get a clearcut expression of congressional history stating that veterans' preference laws will not succumb to the ERA. It is just not going to happen.

So where does that leave us? That leaves us with a choice between adding clarifying language or hoping, as the American Veterans Committee does, that the Supreme Court will not strike down all veterans' preferences.

There is a great deal of testimony and evidence that veterans' preference will be stricken by the Supreme Court under the ERA.

Mr. **Rhoades**. Well, Mr. Chairman, we share the concern of all the other national service organizations on that and we share your concern as well.

Senator **Hatch**. I personally believe that veterans' preferences are vulnerable. I do not see how anybody can reasonably conclude otherwise.

It is not an issue before this committee, whether veterans' preferences are right or wrong. I personally believe that they are right.

Mr. **Rhoades**. As we do.

Senator **Hatch**. I want them to be upheld in law. I believe that they have been promised to the people who went into the service and risked their lives.

Mr. **Rhoades**. They are earned rights.

Senator **Hatch**. They are earned rights, and if we pass a constitutional amendment that does away with those rights, this country will not be living up to the obligations that it undertook when these people made sacrifices for our country.

Mr. **Rhoades**. That is correct.

Senator **Hatch**. Well, then, that being the case and since there will be no clearcut expression that veterans' preferences, as you define them, Federal, State, and local will not be outlawed or disallowed, it seems to me that you are left with one option, and that is to ask that the equal rights amendment be amended to make it clear that veterans' preferences will not be eliminated.

Mr. **Rhoades**. Mr. Chairman, we favor any necessary means to preserve veterans' preference and veteran law. If it has to be that, it has to be that.

Senator **Hatch**. That is the only way you are going to ensure them. That is the only way I can see that you are going to absolutely protect the present situation regarding veterans' preference laws.

Mr. **Rhoades**. We do think the legislative history approach ought to be studied. We do think it is reasonable, but again, as I said, we, as a national service organization, would be derelict in our duty if we did not insist that veterans' preference and veterans' rights and benefits be absolutely protected.

Senator **Hatch**. It seems to me your organization is going to have to support an amendment to the ERA. I do not see any other way. The recommendation of your attorney would be wonderful if all of Congress could agree that veterans' preference would not be affected by the ERA, and create such a legislative history, but there is just no way that we are ever going to have agreement on that.

In fact, most of the evidence, most of the assertions go the other way—that veterans' preference laws are going to be either seriously disrupted or abolished. Most proponents believe that we will shift from the intent test advocated by the prior witnesses to a disparate impact or effects test which would have dramatic impact on veterans' preference laws.

I did not mean to stop you from giving any further statement. Please go on.

Mr. **Rhoades**. No; that actually concludes my statement, Mr. Chairman.

[The following was received for the record:]

Vietnam Veterans of America, Inc
329 Eighth Street, N.E.
Washington, D.C. 20002

(202) 546-3700

STATEMENT OF

DENNIS K. RHOADES

EXECUTIVE DIRECTOR

OF

VIETNAM VETERANS OF AMERICA

FEBRUARY 21, 1984

Mr. Chairman, Members of the Subcommittee, VVA is pleased to have this opportunity to present our views on two issues as important as veterans preference and the Equal Rights Amendment. Our organization strongly supports both, since ultimately they address the same principle: parity.

Vietnam Veterans of America is a national veterans service organization made up exclusively of Vietnam veterans. We have testified before Congress many times on issues relevant to Vietnam Veterans, such as Agent Orange, Post-Traumatic Stress Disorder, Employment, Small Business Administration and Judicial Review of the Veterans Administration. We view as our mandate to foster, encourage and promote the improvement of the condition of the Vietnam veteran.

At our first National Convention in November of 1983, the delegates passed a resolution that said in part

> "Therefore Be it Resolved that VVA support the passage of the Equal Rights Amendment by the Congress, and its ratification by the States, affording equal responsibilities, rights, and protections to female citizens under the United States Constitution."

In addition, the delegates also passed a resolution that stated in part,

> "Be It Resolved that Veterans preference in the Federal, State and local civil service systems be continued and enforced, including periods of Reduction-in-Force."

While it has been suggested in some quarters that ERA and veterans preference are in conflict, VVA believes that the two can exist side-by-side. Both principles address the fundamental question of parity. The ERA affords women parity on all levels of the socio-economic scale and major issues such as equality of pay have been the focus of national debate for the last decade. The principle of parity, which veterans preference -- and indeed, the whole body of law created to address treatment of those men and women who fought for this Nation -- is probably less familiar. First, it should be understood that Vietnam veterans entered military service, like their predecessors, not for rights and benefits which would follow but because they felt a sense of duty and obligation as citizens. The Nation, in its wisdom, however, has established a social contract with its citizen-soldiers which should not be retroactively abrogated, since that citizen has already upheld in the finest tradition his or her responsibilities under that contract. We share the view of the Bradley Commission which concluded nearly three decades ago, that the Government has, without a doubt, a lifetime commitment to those injured on the field of battle to their widows, widowers and orphans. In addition, the Government's responsibility to all men and women who who served is a commitment to provide the necessary assistance to achieve parity at all levels of civilian life.

Our unique position in supporting both ERA and Veterans Preference brings us before this Committee to urge that in considering the ERA, Congress assure that veterans preference, rights and benefits are adequately protected. We believe that this protection is necessary because of past legal challenges to veterans preference on the basis of sex discrimination. It has been suggested for example, that the 1979 Supreme Court decision in Fenney v. Massachusetts might have been resolved differently if ERA, without protection for veterans preference, had then been a part of the Constitution. In fact, the President of the League of Women Voters testified before a House Committee just last year that ERA might enable the Feeney case to be overturned -- which would jeopardize all veterans preference programs throughout the

Nation. We also note that the National Organization of Women still retains a 1971 resolution calling for the elimination of veterans preference in any form, and this presumably includes the service-disabled. We think such positions are unfortunate and may alienate potential supporters of ERA, especially since we believe that the two issues can reasonably co-exist.

If indeed, most Vietnam veterans are men, the primary reason was an all male draft. This is not to denigrate the honorable service of our women veterans, but simply to reiterate historical fact. We are therefore adamently opposed to the use of ERA as a vehicle for undermining those rights that men and women who served in the military earned as a result of their service. Nor should the integrity of ERA be encroached because of a misperception that ERA and veterans preference are mutually exclusive.

We have had discussions with many of our members concerning reconciling ERA and veterans preference. Some have suggested that ERA should be amended and have sought to introduce that issue at our next National Convention. We believe there is another way. In constitutional issues the courts examine the Legislative Reports for intent of Congress, much as they do for statutes. We therefore believe that an unequivocal expression of Congressional intent that ERA should in no way interfere with the rights, benefits and preferences established for veterans by Federal, State and local governments would be more than sufficient to protect the system of compensatory programs established in recognition of military service.

Thank you.

Vietnam Veterans of America, Inc.
2001 S St. NW
Suite 700
Washington, DC 20009-1125

(202) 332-2700

June 20, 1984

Honorable Orrin Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

Thank you for sending the transcript of the February 21, 1984 hearing which you conducted as Chairman of the Subcommittee on the Constitution of the Senate Judiciary Committee on the effect of the Equal Rights Amendment on veterans preference. The information elicited from the witnesses at the hearing, particularly the panel of attorneys, has shed new light on the issue and prompted me to investigate the implications of ERA further.

I have since reviewed a wealth of material, including position papers on the issue written by various women's groups, and have concluded that the ERA, as presently proposed, would not only place veterans preference, in whatever form, at risk, but could conceivably imperil the entire veterans benefits system through judicial challenge.

Vietnam Veterans of America is a national veterans service organization whose principal purpose is to foster, encourage and promote improving the condition of the Vietnam veteran. This is our primary responsibility. Our first National Convention, held last November, affirmed our members' strong support for preference at the National, State and local levels for our men and women veterans.

Vietnam Veterans of America is also mandated by convention resolution to support passage of the ERA, and we will continue to do so. It is apparent, however, that given both the past history and current national policy of an all-male draft, some explicit safeguards for veterans preference and benefits will need to be incorporated in the amendment itself. VVA's Board of Directors, therefore will be considering a modification our organization's position to include an amendment to the ERA to protect veterans preference and the veterans benefit system.

Thank you again for the opportunity to share our views on this vital issue.

Sincerely,

Dennis K Rhoades

DENNIS K. RHOADES
Executive Director

DKR:cyt

Senator HATCH. We will now hear from the AMVETS, and David Passamaneck.

STATEMENT OF DAVID J. PASSAMANECK

Mr. PASSAMANECK. Thank you, Mr. Chairman, for the privilege of appearing before this distinguished subcommittee to present the views of the approximately 200,000 members of AMVETS.

I am Col. David J. Passamaneck, national legislative director of AMVETS.

AMVETS believes, without reservation, that preference in hiring and retention in the civil service is a right for life of war veterans, a right which they have earned through the unparalleled sacrifices which military service demands. The preference in favor of the hiring of veterans is one affirmative action program which is based on performance and achievement and not racial or sexual accident of birth.

The tenacious efforts of various interest groups antithetical to the national defense and military service, to curtail, or completely remove veterans' preference is consistent with the quasi-treasonous conduct of so many inhabitants of this country during the Vietnam war, conduct which contributed in no small way to the tragic result of that war.

[Interruption.]

Senator HATCH. Let me interrupt you. I agree with that. We will have no further outbursts in the room.

Mr. PASSAMANECK. Sir?

Senator HATCH. I agree with what you just said. Let us have no further outbreaks in this room. I want all witnesses treated with respect.

Please go ahead.

Mr. PASSAMANECK. One of those efforts, of course, has been to question all veterans' programs as violations of the concept of gender equality by applying the radical socialist philosophy of equality of numerical result rather than equality of opportunity.

The Supreme Court in *Feeney* officially recognized that veterans, men and women, are special people and entitled to special benefits administered by the Government they served.

AMVETS takes no specific position on ERA. Indeed, our last national convention voted down a resolution opposing it. However, if there is to be an ERA, then we would insist that clear and specific language be included therein defining equality as equality of opportunity and not numerical equality of result and specifically excluding all veterans' preference and entitlement programs, State or Federal, and manning and training criteria of our Armed Forces from the effects of the effects of the amendment.

Without such mandatory language the courts, contrary to simple common sense and inspired by the fraternity of leftwing law school professors, will assuredly interpret ERA so as to viciously attack veterans' programs as well as the standards of tactical management of our Armed Forces consistent with the perverted logical of at least one Federal court in connection with so-called comparability of worth.

It is quite clear that ERA will be used by many of its most vigorous supporters as another tool against veterans and the national defense establishment in general, not necessarily because of their belief in equality but because of their deeper hostility to the legitimate security interests of this country and the noncommunist West.

AMVETS opposes all efforts to curtail or abandon preference for veterans in Federal or State hiring and retention regardless of any racial or sexual considerations which may form elements of other legislative programs including ERA. Preference in hiring and retention of all war veterans, regardless of race of sex, has been an honored keystone of our national policy since the close of World War II. Let us keep it that way and strengthen the policy where necessary.

This concludes my testimony, Mr. Chairman. I will be happy to answer any questions.

Senator HATCH. Thank you, Mr. Passamaneck. I take it then that you do not want to deny any of the existing veterans preference laws, either by the judiciary or by the legislation. You want to keep the veterans preference laws in tact.

Mr. PASSAMANECK. Yes, sir, if necessary strengthen them.

Senator HATCH. The testimony before our committee has suggested that, if the ERA passes women will have to go into combat on an equal basis with men. Do you agree with that particular point?

Mr. PASSAMANECK. Let me say the very key legal phrase "compelling governmental interest" has been used previously in this session, this hearing, to explain that certain compelling governmental interests could override requirements even of the ERA.

We believe that our national defense, the management of the defense establishment, the armed services, and the administration of veterans programs which derive their justification from the war powers clause just as the administration of the active Armed Forces do, all fall within the purview of compelling governmental interest.

So that even if you did pass an ERA, and we had to go up and argue that veterans' preferences and programs were omitted from its purview and we had to argue that women being put into combat and so forth, that that sort of thing is omitted from its purview, we would use that compelling governmental interest argument.

Of course, we would prefer not to have to do that by including specific language in the amendment.

Senator HATCH. There is much evidence and much testimony that you would fail if you used that argument.

Mr. PASSAMANECK. I think so. I think we probably would fail.

Senator HATCH. Would your organization advocate an amendment to the equal rights amendment to protect veterans' preference rights?

Mr. PASSAMANECK. Absolutely, sir.

Senator HATCH. Let me ask a question of the whole panel. In your view, what are the principal justifications for the veterans' preference programs. As I understood it, Ms. Willenz, you indicated that rehabilitation would be the principal justification for the programs and not much else. Am I wrong on that?

Ms. **Willenz**. Well, the reintegration of veterans into the community, and as my colleague here said, we are fully behind the concept of a social contract amongst veterans and Government.

We also insist that women are increasingly playing a role in the defense of their country and they will continue to do so, and we advocate opening up more doors, more access for women in the military services so they can, indeed, have equality of rights and then we can expect them to take equal responsibility.

Senator **Hatch**. What about the concept that has been mentioned about rewarding veterans for a job well done? Is that an appropriate objective?

Ms. **Willenz**. As I recall most of the legislative history behind the veterans' benefits programs, it was intended to make up for time and opportunities lost. That was the major premise underneath many of the programs.

Mr. **Weil**. In addition, Senator, our motto is "Citizens first, veterans second." We believe that the person who went into service when his country called in time of war and served and came out without damage to health, has done no more than his duty. I think every citizen should be ready to do that much and needs no further reward.

Senator **Hatch**. Let me ask the rest of you this question. In your view, what are the principal justifications for veterans' preference programs? Are they primarily for rehabilitation? Is that the only justification or are there others? Let us start with you, Mr. Passameneck.

Mr. **Passamaneck**. Senator, I think probably perhaps the greater reason or more reason exists for veterans' preference programs in the initial rehabilitation or readjustment impact. However, I do feel that there is and that it is definitely intended and was intended historically by the Congress and all other parties having to do with the administration of veterans' preference programs to also consider them to be a reward well earned by those who have served in the military service.

I think both motivations are behind the program. I would say perhaps the rehabilitation is a little stronger if you want to weigh the strength of each, but I think they are both there.

Senator **Hatch**. You would not limit the rationale for veterans' preference to rehabilitation?

Mr. **Passamaneck**. No, sir. As I said in my testimony, a right for life.

Senator **Hatch**. Mr. Riggin.

Mr. **Riggin**. We believe that veterans' preference apart from being rehabilitative in nature is just as much a readjustment benefit to compensate someone for having their employment lives interrupted by service, by involuntary service.

I guess I use both terms in the same sentence, readjustment and compensation. From a readjustment standpoint, obviously, veterans' preference is only one part of a larger package which includes the GI bill, educational assistance for certain veterans.

Obviously veterans' preference is not used by a lot of people coming out of service who are not in areas where they can even seek a Federal job or a State job. So it simply has to be part of a larger package of benefits.

Senator HATCH. Thank you.

Mr. Schwab.

Mr. SCHWAB. Mr. Chairman, I would associate myself with the remarks of my colleague Phil Riggin here. While I have the microphone, sir, if I may, I like to know with whom I am dealing. Now, the bona fide veterans organizations at the witness table represent over 5 million people, with their auxiliaries perhaps 7 million. I do not know who the American Veterans Commission represents, how many. I would like that made a matter of record, sir.

Senator HATCH. You mean the American Veterans Committee?

Mr. SCHWAB. Yes, sir. How many people they represent? Who they are?

Ms. WILLENZ. We represent approximately 25,000 veterans male and female of four wars.

Senator HATCH. Mr. Rhoades.

Mr. RHOADES. Mr. Chairman, I think in our statement we indicated that the Bradley Commission set the tone for the whole system of veterans' benefits that has been established over the years when they talked about giving the disabled and the war wounded the kind of assistance they need to carry on productive lives, to provide all men and women who went into uniform the opportunity for readjustment.

I think there are also a lot of other reasons that Congress has created the system of veterans benefits. One that comes to mind is the idea that somehow a veteran who served his country should end up indigent. Congress has, in the past, found that to be intolerable.

So I think there are many reasons for the veterans' benefits system. I think most of them that I have heard are all very valid.

Senator HATCH. Thank you. I just want to thank all witnesses who have appeared here today.

This is an interesting issue. It is one that I think involves deep-seated feelings on both sides, and without passing judgment, I believe that the more we discuss the equal rights amendment, the more we ask questions about it, the more we are finding that it is a very ill-defined set of words. As wonderful as these words may sound, they may have wide ranging constitutional implications that can affect everybody in our society.

My personal belief is that we should work as hard as we can to resolve the problems with the ERA; we should all fight to promote equal rights for women. In that context, I would point to S. 501 recently approved by this subcommittee.

If Congress would spend one-tenth the time resolving the conflicts that presently exist in the law, as on the ERA we could resolve many of these conflicts within a relatively short period of time compared to the 50 years we have spent haggling about what these particular words written in the Constitution will or will not do.

I am concerned about it because I believe that before we amend the Constitution, we ought to be very, very sure about the implications of what we are doing.

The more I listen to witnesses, the more I find that even the proponents—in fact, primarily the proponents—admit that it is going to come down to court decisions.

I do not know about others, but I have a difficult time in allowing the courts to resolve these problems. I would rather have elected representatives of the people resolve these problems.

There are countless Federal laws already dealing with women's rights that are on the books. We need to enforce those laws, and enact others that will secure women equal rights. If we did this, we would be a lot further ahead in the final analysis in securing women equal rights than in continuing this divisive political debate.

We are going to continue to hold these hearings. We will try to do this expeditiously and we will try to make sure that we have the best people we can find on both sides of these issues. We hope we will be able to continue until some of these matters are resolved.

Did you have a comment?

Mr. GRAHAM. Yes, Mr. Chairman. When ever the discussion of veterans preference comes up, I like to think back to something that Rudyard Kipling said. In one of his poems he mentioned, "Tommy this and Tommy that and chuck them out the brut but savor of his country when the guns begin to shoot."

I find it particularly repugnant at times that we discuss the removal of a right that is earned such as veterans' preference after the guns have stopped shooting.

Senator HATCH. I think that is a good point at which to end this particular hearing. I want to thank everybody for testifying, and we will turn to Senator Thurmond, if you have any comments, Senator, before we adjourn.

The CHAIRMAN. Well, Mr. Chairman, I will not take but just a minute. I want to commend all the representatives of these veterans organizations for their presence here today and testifying on this important matter.

There is not any question in my mind that people who fought for their country, whether they are men or women, should have a preference. I think that preference should continue and nothing should interfere with it.

Now, I just want to propound this question briefly. Since there have been veterans' preferences of various types since immediately after the war between the States and these special considerations for veterans have been institutionalized for many decades now, is it not reasonable to conclude that the American public views such preferences to be fair and a manner by which to compensate those who have sacrificed and endured the hardships of having their lives disrupted, family separations and physical pain and suffering? I just wanted to ask you if you will just go down the line and if you will just give you name and answer yes or no.

Ms. WILLENZ. Yes, we support veterans' preference as a principle. We support an initial appointment for all veterans and full preference for the disabled veterans.

Mr. PASSAMANECK. Colonel Passamaneck representing AMVETS. As I said in my statement, we believe without reservation the preference in hiring and retention in civil service is a right for life of war veterans, a right which they have earned to the unparalleled sacrifices which military service demands.

Mr. **Riggin**. My name is Phil Riggin. I am legislative director for the American Legion. It is obvious that based on legislative history that the American public generally and Congress itself has had the opportunity to challenge veterans' preference if it wanted to. It has not done that in any substantive fashion with possibly one exception. So clearly there has been ample opportunity for a public expression on whether veterans' preference is good or bad.

Mr. **Schwab**. I am Donald H. Schwab, the legislative director for the Veterans of Foreign Wars, and as you know, Senator, we support veterans' preference in Federal employment and no women in combat.

Mr. **Graham**. Senator, I would just like to bring up a point—I am with the Veterans of Foreign Wars—that the Harris survey was conducted by the Veterans' Administration back in approximately 1980 and stated that the public at large felt that much more should be done for veterans.

Mr. **Rhoades**. Senator Thurmond, Dennis Rhoades, Vietnam Veterans of America. We believe in the veterans' preference and veterans' rights and entitlements system. We believe it should be improved. We believe that the American public has always backed it and will continue to back it.

The **Chairman**. Mr. Chairman, I want to commend you for holding these hearings. I realize there will be some criticism of you in saying why not bring out the constitutional amendment, why not go ahead and act?

I think you are very wise to delve into every facit of it. The public is entitled to do that. The public is entitled to know the true facts. Then the Senate can make up its mind what it wants to do.

But just to gloss over it and not delve deeply as you are doing would be a greater injustice, I think, to the people of this country, and I just want to commend you.

Senator **Hatch**. Thank you, Mr. Chairman. I appreciate those words coming from the distinguished chairman of the full Judiciary Committee.

Again, I want to thank all witnesses for appearing. We respect the testimony of all of you.

We have scheduled our next hearing for March 20 on the ERA impact on Social Security. With that, we will recess until further notice.

[Whereupon, at 12:15 p.m., the subcommittee adjourned at the call of the Chair.]

MISCELLANEOUS MATERIAL

The National Association of
STATE DIRECTORS OF VETERANS AFFAIRS, INC.

A. LEO ANDERSON
Washington, D. C.
President
[illegible]
New Mexico
Vice President
[illegible]
Virgin Islands
Secretary-Treasurer
RAY J. KAUFFMAN
Iowa
Judge Advocate-Historian
DISTRICT VICE PRESIDENTS
District I
JOHN H. EATON
Maryland
District II
[illegible]
District III
[illegible]
Florida
District IV
[illegible] LEAVELL
[illegible]
District V
[illegible]
Arizona

Mr. F. James Sensenbrenner, Jr.
Ranking Minority Member
Subcommittee on Civil and
Constitutional Rights
Room 315, Cannon House Office Bldg.
Washington, DC 20515

October 17, 1983

Dear Mr. Sensenbrenner:

Thank you for your letter of November 4, 1983, requesting comments on the statement of Dorothy Ridings, regarding the effect of ERA on Veterans Preference.

The National Association of State Directors of Veterans Affairs (NASDVA) understands the Feeney decision to have determined that the relative numerical effect of a law such as veterans preference on men and women is irrelevant in connection with the issue of gender equality so long as that law does not verbally discriminate and the intent of such law was obviously neutral.

In the case of Massachusetts v. Feeney, the Supreme Court pointed out that veterans preference laws served the admirable public purpose of compensating and rewarding veterans for national service.

NASDVA therefore believe that the Feeney decision would continue to be applicable even if an ERA Amendment to the Constitution was adopted.

We cannot lose sight however of the obvious invitation that ERA Amendment would offer for continous and costly litigation regarding all aspects of its interpretation, including veterans preference. We can anticipate wholesale uncertainity and confusion regarding the meaning of any ERA Amendment with no promise of definitional resolution in the foreseeable future.

Your reference to the possible impact of an ERA Amendment as what you describe as "Veterans Preference in other areas", of course raises the spectre of an across the board assult under the aegis of ERA against the entire system of veteran and retired military entitlements; for the same numerical disparity as between men and women that exists for veterans preferences for public employment would of course also apply to compensation, pension, loan guaranty programs, medical care, retired-military pay and all other beneficial programs for veterans simply because there were and obviously will be in the future, many more male than female veterans.

It is therefore the considered opinion of the NASDVA that the passage of an ERA Amendment would constitute the opening of a pandoras box of dubvious arguments which could and obviously would be used by anti-veteran feminists (most of whom are against National Defense and in favor of Unilateral Disarmament) to destroy the entire system of veterans and military retired entitlements as we now know it.

It is for these reasons that the NASDVA would not favor the enactment of an ERA Resolution by the Congress.

Sincerely,

A. Leo Anderson

A. Leo Anderson
Washington, DC Liaison Officer

REGULAR VETERANS ASSOCIATION
OF THE UNITED STATES
An association of active, retired disabled and honorably discharged members of the Armed Forces of the United States
(ESTABLISHED in 1880 as the U. S. MAIMED SOLDIERS LEAGUE)

October 12, 1983.

The Honorable F. James Sensenbrenner, Jr., M.C.
Ranking Minority Member
Sub-Committee on Civil Right and Constitutional Rights
Committee on the Judiciary.
House of Representatives.
Washington, D.C. 20515.

Dear Congressman Sensenbrenner, Jr:

Thank you for your letter of October 4 and the copy of the statement by Dorothy Ridings, President, League of Women Voters.

I have recently written to our local newspaper, the Austin Statesman-American, regarding several employment programs and this particular statement by Mrs. Ridings. I am asking National Commander Wallace Sheppard to send you a copy of my letter to the local newspaper outlining the stand of the Association.

The Regular Veterans Association, the direct descendent of the U.S.MAIMED SOLDIERS LEAGUE (USMSL),founded August 10, 1880, by combat blinded, wounded, limbless and disabled Civil War veterans of the Regular Military Establishment, has always fought for the retention of Veterans Preference. Our testimoney on March 1, 1983, before the joint House and Senate Veterans Affairs Committee will attest to our position on veterans preference. I believe you can secure a copy from the House Veterans Affairs Committee. Our records, obtained from the USMSL when they 'folded their tent' after the 1933 Economy Act, indicates several items of interest.

1) The USMSL and the Grand Army of the Republic (GAR) worked together and wrote the veterans preference act that first appeared in the 1883 Civil Service Act. From that time on, the USMSL and then the RVA has worked on local, state and Federal levels to put in Veterans Preference and to fight to retain it in those areas where it now exists.

2) The USMSL left the RVA with the following 'planks' and/or policys that we use as our strong support.

   a) To work to maintain a strong and adequate National Defense and to work for better pay, etc., for members of the Armed Forces.

   b) To work for increase compensation and pensions (after the Civil War the disabled vet received 6$ or $14 a month for his disabilities) and medical benefits for the Regulars who retire due to length of service or for disability

   c) To work for continued employment of all members of our veterans community and to maintain the Federal Veterans preference.

Please be assured that the RVA will notify all Posts and all elected officials to "stand fast" on Veterans Preference. We shall, of course, take any other action to retain the Veterans Preference.

Again, our thanks to you for your timely notice of this action.

Sincerely,

[illegible] B. ENGBERG, I, CDH, National Adjutant

STATEMENT ON THE IMPACT OF THE EQUAL RIGHTS AMENDMENT ON VETERANS PROGRAMS

By Phyllis N. Segal, Esq.

Hearings on February 21, 1984 Before the
Subcommittee on the Constitution of
the Senate Judiciary Committee

I appreciate this opportunity to present testimony on the proposed Equal Rights Amendment. It is my firm belief that the addition of this provision to the United States Constitution is essential and long overdue. At the Subcommittee's request, my statement will focus on a specific issue that has been narrowly framed for consideration at this Hearing, namely "the impact of the Equal Rights Amendment upon veterans programs." Reasoned consideration of this impact unfortunately has been sidetracked to date by some extreme charges and inflammatory rhetoric that careful analysis dispels.

At the outset, it is important to recognize the scope of the government activities embraced by the question that has been posed. As more fully developed in the analysis prepared by the Women's Equity Action League that accompanies this testimony,* the term "veterans programs" covers a broad range of activities providing aid to veterans. These programs, conducted by the federal government and virtually all states, include educational and housing subsidies, academic and vocational training, health services, disability payments, survivors compensation, reemployment rights, unemployment compensation and preferences granted veterans in civil service jobs. Most of these programs are funded from the public treasury and do not impose any direct costs on individuals. The civil service job preferences, however, are structured in a significantly different way: they are not funded from tax revenues and their burden falls directly on those individuals who are denied jobs or promotions because they do not have veteran status.

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*Women's Equity Action League, Veterans Programs and Women: An Analysis (referred to hereinafter as "WEAL Paper"), attached as Appendix A

As with other government policies and practices, there have been serious problems of sex discrimination in the design and implementation of some veterans programs. The WEAL Paper describes numerous examples of this, including the repeated use of sex as a classifying tool in veterans programs to explicitly provide different benefits to female and male veterans. Women who served in the Nation's defense have not always been included within the definition of "veterans." Even after this problem was remedied, female veterans sometimes found themselves with fewer benefits than those granted male veterans. For example, a married woman veteran was denied certain educational benefits granted to married male veterans; and her surviving spouse received benefits only upon proof of financial dependency. Such dependency restrictions did not apply to the surviving spouse of a male veteran.

Although many of these explicit gender line problems have been eliminated others remain, like the federal provision that grants an employment preference to mothers but not fathers of a deceased veteran. In addition, even when statutes do not contain explicit sex based benefit restrictions, practices have diminished the benefits available to female veterans. For example, by ignoring female veterans in the design of health care programs, the Veterans Administration has not provided needed medical services to these women.

Such overt sex-based discrimination reflects the same stereotypes that have distorted other government policies, practices and laws: notions about the "proper role" of women, assumptions about female dependency, presumptions that "females are inferior to males," and other overbroad and often negative generalizations about females. In recent years courts have exposed the unthinking, habitual way such views often influence government decisionmaking. Justice Stevens, for example, has described sex discrimination as the

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"accidental byproduct of a traditional way of thinking about women."[2]

The same views and process inevitably has also deformed government programs that do not use sex per se as a classifying tool. For example, indifference to the role of women in the workforce - traditionally seen as an inappropriate role for females - is at the root of government decisions fashioning far-reaching preferences for veterans in civil service jobs. The more extreme versions of these preferences effectively **make veteran status a job requirement,** and thereby establish a standard that relatively few women are able to meet because of the long history of sex discrimination in the military. The issue here is not, as some claim, whether sex equality is measured by "equal opportunity" or "equal results." **Making veteran status a job requirement has an inescapably severe adverse impact upon the employment opportunities of women because few women can secure jobs that are conditioned on veteran** status. The indifference of decisionmakers to such impact can be traced to the familiar sex biased view that it is unimportant for women to have opportunities to secure better paying, higher grade jobs.

By prohibiting the denial or abridgement of equality of rights under law on account of sex, the Equal Rights Amendment would require that veterans programs which discriminate on account of sex be reformed. The Amendment would clearly prohibit the explicit gender lines that continue to provide different benefits to females and males in such programs. This proposition is intrinsic to the central principle of the ERA: that rights, privileges, duties and responsibilities should not be assigned on account of sex. Forbidding the use of sex as a classifying tool, except in those narrow circumstances where it is necessary to overcome the tragic history of sex discrimination or to protect other constitutional rights, is essential because the classifications that result are always too broad or too narrow. Instead of gender classification lines, government would be required to tailor

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its actions more sharply and accurately. Thus, if the aim of a program is to facilitate the reentry of veterans into civilian life, such assistance should go to all veterans, female and male alike. If the objective is to cushion a loss to a veteran's family, the benefit should not be limited to widows or mothers.

Since sex inequality is not simply a problem of classification lines based explicitly on sex per se, however, the standards for achieving the central principle of the ERA necessarily require further elaboration. A second proposition flowing from this central principle is that government classifications based on physical characteristics unique to one sex must be strictly scrutinized to assure that such conduct does not deny sex equality under law. When government treats individuals differently in terms of such sex-specific biological characteristics, it treats them differently on account of their sex. Since there are a limited number of circumstances where the use of such classifications does not maintain sex inequality, the ERA will not prohibit all such classifications, as it would classifications in terms of sex per se. The Amendment would require, however, that classifications based on physical characteristics unique to one sex be subjected to the strictest constitutional scrutiny. Such classifications would survive this scrutiny only if government demonstrates that they are necessary and the reasons for them are compelling.

The third proposition necessary under the ERA is that government action which classifies in terms of a function or characteristic, rather than in terms of sex per se or sex specific biological characteristics, but has a discriminatory effect on one sex, must be closely scrutinized and under some circumstances be prohibited. Although such classifications often are referred to as "facially neutral," the distinction this benign label suggests between these classifications and ones based on sex per se may be more illusory than real. Both types of official conduct may carry the same "baggage of sexual stereotype,"[3] be attributable to the same "habitual" ways of thinking about the sexes and operate to maintain similiar destructive patterns of sex inequality.

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The "facially neutral" label is often attached to programs providing benefits to male and female veterans alike. As mentioned above and elaborated in the WEAL Paper, however, the long history of discrimination against women in the military has resulted in few women in the group such programs benefit, and a disproportionate number of women in the group that does not receive such benefits. Where veterans programs are funded from the public treasury (as most are), the cost is distributed broadly and the impact spread among all individuals - including taxpaying veterans themselves. However, programs that provide hiring or positional preferences to veterans in government jobs impose their burden directly on those competing against veterans for such jobs. With few women able to meet a veteran status job requirement, there is an inevitable tension in these types of preference programs between the goal of aiding veterans and the goal of eliminating practices that maintain sex segregation and sex hierarchy in the workforce. The question that is sharply focused is whether and under what circumstances a veterans employment preference program denies equality of rights under law on account of sex, and would be prohibited by the ERA.

When the Supreme Court was faced with this question under the Equal Protection Clause, the answer it effectively gave was "never." In Personnel Administrator of Massachusetts v. Feeney,[4] the Court ruled that Massachusetts' extreme absolute and permanent veterans preference law would not be subjected to close constitutional scrutiny unless plaintiffs could demonstrate that the law was enacted because the official decisionmakers wanted to harm women. The Court acknowledged that the preference "operates overwhelmingly to the advantage of males" and the impact upon the public employment opportunities of women is "severe."[5] Nevertheless, the Court concluded that since the law was aimed at helping veterans, it was not motivated by illicit intent.[6] Accordingly, the Court applied a relaxed standard of review and found the preference law constitutional.

In adopting this approach, the *Feeney* Court cited prior decisions in cases involving race discrimination challenges, where it had professed concern that strict constitutional scrutiny of all official conduct with a disparate racial impact would invalidate too wide a range of public programs.[7] To avoid this result, the Court has insisted that other factors be established in addition to disparate racial impact in order to trigger strict scrutiny. Such factors have included the forseeable consequences of the challenged action; the presence of subjective decisionmaking; and the totality of circumstances surrounding a particular government decision.[8]

In *Feeney*, however, the Court transformed this multifactored analysis into a search for a smoking gun of illicit intent. There is no indication that the Court considered whether threshold factors other than illicit intent, or a more flexible standard of scrutiny, might be a more appropriate way to meet its concerns. Moreover, the Court apparently disregarded its decisions in cases involving explicit sex classifications, where it had recognized that sex discrimination is often an "accidental byproduct" of conventional way of thinking; a product of "habit rather than analysis or reflection."[9] Insisting on proof of "bad intent" in cases involving facially neutral action is basically inconsistent with this insight. Rather than serving as a principle to *limit* judicial review, requiring such proof effectively closes the door to any meaningful scrutiny of ostensibly neutral actions that cause sex-based harm since such intent can rarely (if ever) be established - either because it does not exist, or is hidden too well. Congress recognized this fundamental flaw in 1982 when it soundly rejected such a narrow discriminatory purpose requirement for race discrimination claims under the Voting Rights Act.

Under the ERA, principles to limit judicial review of facially neutral action should be tailored more appropriately to the problems of sex inequality targeted by the Amendment. This would be

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accomplished by requiring rigorous judicial scrutiny of facially neutral conduct that has a sex discriminatory impact if it can be traced to and reinforces, or if it perpetuates, patterns of sex inequality similar to those associated with facial discrimination.

In cases where such scrutiny is triggered, the determination whether the challenged action violates the ERA would involve an inquiry into such factors as the importance and legitimacy of the government's objective; the severity of the adverse impact; and whether the challenged action is necessary to achieve the objective. A key inquiry is whether the government could achieve its purpose in ways that avoided inflicting or mitigated the sex-based harm.

The elements of this analysis are familiar to constitutional litigation and consistent with the concerns underlying the judicial doctrine interpreting the Equal Protection Clause. The analysis reflects, however, the application of those concerns to the phenomenon of sex inequality. This approach does not choose between the rhetorical alternatives often posed of "discriminatory intent," on the one hand, and "disparate impact," on the other. Such rhetoric misses the point and confuses the real issue, which is whether requiring proof of discriminatory purpose in order to trigger meaningful constitutional scrutiny is an appropriate way to limit judicial review. Since such a requirement effectively immunizes facially neutral action that is sex discriminatory, it clearly is not appropriate. Limiting principles under the ERA would more effectively balance the commitment to ending sex inequality with the concern for proper deference to the legislative and administrative decisionmaking process.

Applying such ERA analysis to determine whether a particular program awarding veterans preference for public jobs will need to be reformed requires a careful fact-based assessment. Since the extreme veterans preference statute challenged in Feeney already has been subjected to such fact-finding, it serves to illustrate the analysis that would be applied. There, the trial court found that the statistical adverse impact of the preference scheme was severe and that it devastated women's ability to secure desirable civil service positions, locking in a sex hierarchy in the state workforce similar to familiar patterns of sex inequality. These factual findings should be sufficient to trigger close judicial scurtiny of the challenged law under the ERA.

Justice Marshall's dissenting opinion in Feeney illustrates how such close scrutiny would work. After discussing each of the objectives that government asserted in defense of the Massachusetts law, Justice Marshall concluded that Massachusetts had "failed to establish a sufficient relationship between its objectives and the means chosen to effectuate them."[10] In particular, Justice Marshall pointed to the range of less drastic veterans preference laws enacted in other jurisdictions as confirming that less discriminatory alternatives were available to meet the goal of aiding veterans without so severely harming women.

In short, the "impact of the ERA on veterans programs" would be to require that these programs, like other government activities, be designed and carried out in ways compatible with the central precept of sex equality under law. The Amendment would clearly require the elimination of explicit gender lines that deprive female veterans of benefits accorded male veterans. It also would require reform of overreaching veterans employment preference laws like the one in Massachusetts. Just as clearly, however, the ERA would not prevent government from providing benefits to veterans. The vast majority of such benefits do not cause the extreme sex discriminatory consequences that inescapably resulted from the Massachusetts employment preference scheme, and therefore heightened judicial scrutiny would not even be triggered if an ERA-based challenge was ever asserted. Where a veterans preference program does have a severe adverse impact on one sex and there is evidence connecting that impact to patterns of discrimination against the disadvantaged group, however, it would be closely scrutinized to determine whether government could better balance the mandate for

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equal opportunity with the goal of aiding or rewarding veterans for their contributions. As Justice Marshall's dissent in Feeney makes clear, the goal of compensating veterans can be achieved without unduly limiting the employment opportunities of women.

Enactment of the ERA, with its two-year "waiting period" will provide the necessary incentive for officials committed to sex equality under law to achieve any necessary changes in veterans programs and other government activities through the process of legislative reform. Under the ERA, such legislative decisions will finally be guided by an analysis that includes concern for sex equality, rather than continue to be distorted by the habit, indifference and stereotypic thinking that traditionally has perpetuated sex segregation and the subordination of women in this Nation.

FOOTNOTES

1. See, e.g., Califano v. Goldfarb, 430 U.S. 199,223 (1977); Stanton v. Stanton, 421 U.S. 7, 14-15 (1975); Frontiero v. Richardson, 411 U.S. 677, 687 (1973).

2. Califano v. Goldfarb, 430 U.S. at 223.

3. Orr v. Orr, 440 U.S. 268, 283 (1979).

4. 442 U.S. 256 (1979).

5. 442 U.S. at 259, 271.

6. 442 U.S. at 279-80.

7. Washington v. Davis, 426 U.S. 229, 247-48 (1976).

8. See, e.g., Columbus Board of Education v. Penick, 443 U.S. 449, rehearing denied, 444 U.S. 887 (1978); Castenada v. Partida, 430 U.S. 482, 497 (1977); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 266 (1977).

9. Lehr v. Robertson, 103 S.Ct.2985, 2996 n.24 (1983).

10. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. at 286.

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THE ERA AND VETERANS PROGRAMS
(Some Quotes)

While it is valid for the State to take steps to re-integrate veterans into civilian society, a rule giving them absolute preference over all qualified women applicants for State employment is unacceptable under the ERA...

Barbara Brown, Women's Rights
and the Law (p. 17)

An alternative to abolition of veterans preference /under the ERA/... which might be consonant with the ERA would be to extend /veterans preference/ to any veteran and his or her spouse... this would lessen its discriminatory impact.

California Commission on ERA,
A Commentary on the Effect of
the ERA (p. 122)

The broad veterans preference statute challenged in Massachusetts v. Feeney, which granted an absolute lifetime preference to veterans seeking public employment in Massachusetts civil service would fall in a challenge under the ERA.

Dorothy Ridings, League of
Women Voters, Testimony Be-
fore House of Representatives
September 14, 1983

The "weakness" of Title VII /prohibiting employment discrimination against women/ is that it "expressly exempts veterans preference programs.

Rhonda Bernstein, Women's
Legal Project, National Law
Journal, September 19, 1983

Programs to reward our veterans re-entering the work force would have to be more narrowly tailored and carefully weighed against the ERA's prohibition against sex discrimination so as not to unduly limit employment opportunities for women.

Congressional Women's Caucus,
Statement on ERA, November 1, 1983

The dissent's analysis in Feeney of the veterans preference statute illustrates the approach required by the ERA.

Professor Ann Freedman, Rutgers
Law School, Testimony Before
House of Representatives, Novem-
ber 3, 1983

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The National Organization for Women (NOW) opposes any state, federal, county, or municipal employment law giving special preference to veterans.

NOW Resolution (1975)

The outcome of Feeney plainly would be different under the ERA.

Professor Thomas Emerson, Yale
Law School, Testimony Before
House of Representatives, October
19, 1983

I do not foresee the Congress or State legislators enacting a host of laws ending veterans preference... but it is clearly predictable if the race cases are a criterion that endless litigation will ensue leading to probable results in specific cases which this Congress, acting separately, would never countenance.

Former Rep. Charles Wiggins,
Testimony Before House of Rep-
resentatives, October 20, 1983

The problem is to make sure that the veterans preference attaches to those legitimate objectives and doesn't forever and forever, amen, give to all sorts of people rights that sometimes then can be discriminatory. So what will happen /under the ERA/ is that we will have to look at veterans preference... and they should be targeted to hep the veterans that you are talking about... it's for making sure that incorrect discrimination is not masquerading under veterans preference.

Rep. Patricia Schroeder,
November 19, 1983

Another problem of critical importance to the principle of equality is the Supreme Court's holding that discriminatory impact on women of an ostensible neutral rule is off limits to critical analysis under the 14th Amendment, except when disparate impact can be traced to a purpose to discriminate. In Massachusetts v. Feeney, the Court refused to look to a Massachusetts veterans preference law so extreme that it resulted in total exclusion of women from the upper echelons of the Massachusetts civil service. The principle of equality /under the ERA/ is rendered impotent if it cannot reach laws which effectively exclude women from employment for which they are fully qualified and competent.

Martha Barnett, American Bar
Association, Statement to
House Committee on Judiciary

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The issue is whether preferential programs for veterans would violate the ERA. It seems clear to me that they would... It is these three factors then-- the ambiguity of the proposed amendment; a judiciary somewhat divided on the question of intent versus impact; and the rather clear position of those most likely to press for the impact standard in litigation under the ERA-- that I believe would come together and lead to the abandonment of the standard of intent in favor of the standard of impact and thus lead to veterans preference programs being declared unconstitutional violations of "equality of rights under the law" /ERA/.

Professor Gary McDowell, Tulane
University, Testimony Before
Senate, February 21, 1984

This does not mean that /the ERA/ would not invalidate a law which is directed to the discriminatory purpose of harming or disadvantaging women as against men through the guise of a "veterans preference" that is not properly related to the purpose of aiding veterans in relation to their military service and their veterans status.

June Willenz, Americans Veterans Committee, Testimony Before
Senate, February 21, 1984

One of the effects of the ERA would be to deprive veterans of this small preference.

Phyllis Schlafly, Eagle Forum,
Testimony Before House of Representatives, October 20, 1983

Veterans preference programs would be called into question under the ERA.

Professor Henry Karlson, University of Indiana Law School,
Testimony Before House of Representatives, October 20, 1983

Veterans preference programs would be constitutional under ERA if there is equality in the pool of people to be drafted.

Mary Berry, U.S. Commission on
Civil Rights, Testimony Before
House of Representatives, July,
13, 1983

Little wonder that /Members of Congress/ now have concerns about the ERA harming veterans education and civil service benefits...

Dean Phillips, National Tribune,
October 23, 1983

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PERSONNEL ADMINISTRATOR OF MASSACHUSETTS ET AL. *v.* FEENEY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 78-233. Argued February 26, 1979—Decided June 5, 1979

During her 12-year tenure as a state employee, appellee, who is not a veteran, had passed a number of open competitive civil service examinations for better jobs, but because of Massachusetts' veterans' preference statute, she was ranked in each instance below male veterans who had achieved lower test scores than appellee. Under the statute, all veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying nonveterans. The statutory preference, which is available to "any person, male or female, including a nurse," who was honorably discharged from the United States Armed Forces after at least 90 days of active service, at least one day of which was during "wartime," operates overwhelmingly to the advantage of males. Appellee brought an action in Federal District Court, alleging that the absolute-preference formula established in the Massachusetts statute inevitably operates to exclude women from consideration for the best state civil service jobs and thus discriminates against women in violation of the Equal Protection Clause of the Fourteenth Amendment. A three-judge court declared the statute unconstitutional and enjoined its operation, finding that while the goals of the preference were legitimate and the statute had not been enacted for the purpose of discriminating against women, the exclusionary impact upon women was so severe as to require the State to further its goals through a more limited form of preference. On an earlier appeal, this Court vacated the judgment and remanded the case for further consideration in light of the intervening decision in *Washington* v. *Davis,* 426 U. S. 229, which held that a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact and that, instead, the disproportionate impact must be traced to a purpose to discriminate on the basis of race. Upon remand, the District Court reaffirmed its original judgment, concluding that a veterans' hiring preference is inherently nonneutral because it favors a class from which women have traditionally been excluded, and that the consequences of the Massachusetts absolute-preference formula for the employment opportunities of women were too inevitable to have been "unintended."

Held: Massachusetts, in granting an absolute lifetime preference to veterans, has not discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment. Pp. 271–281.

(a) Classifications based upon gender must bear a close and substantial relationship to important governmental objectives. Although public employment is not a constitutional right and the States have wide discretion in framing employee qualifications, any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause. Pp. 271–273.

(b) When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. Pp. 273–274.

(c) Here, the appellee's concession and the District Court's finding that the Massachusetts statute is not a pretext for gender discrimination are clearly correct. Apart from the fact that the definition of "veterans" in the statute has always been neutral as to gender and that Massachusetts has consistently defined veteran status in a way that has been inclusive of women who have served in the military, this is not a law that can plausibly, or even rationally, be explained only as a gender-based classification. Significant numbers of nonveterans are men, and all nonveterans—male as well as female—are placed at a disadvantage. The distinction made by the Massachusetts statute is, as it seems to be, quite simply between veterans and nonveterans, not between men and women. Pp. 274–275.

(d) Appellee's contention that this veterans' preference is "inherently nonneutral" or "gender-biased" in the sense that it favors a status reserved under federal military policy primarily to men is wholly at odds with the District Court's central finding that Massachusetts has not offered a preference to veterans for the purpose of discriminating against women; nor can it be reconciled with the assumption made by both the appellee and the District Court that a more limited hiring preference for veterans could be sustained, since the degree of the preference makes no constitutional difference. Pp. 276–278.

(e) While it would be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable, nevertheless "discriminatory purpose" implies more than intent as volition or intent as awareness of consequences; it implies that the decisionmaker selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. When the totality of legislative actions establishing and extending the Massachusetts veterans' preference are considered, the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men or women. Pp. 278–280.

(f) Although absolute and permanent preferences have always been subject to the objection that they give the veteran more than a square deal, the Fourteenth Amendment "cannot be made a refuge from ill-advised . . . laws." *District of Columbia* v. *Brooke*, 214 U. S. 138, 150. The substantial edge granted to veterans by the Massachusetts statute may reflect unwise policy, but appellee has simply failed to demonstrate that the law in any way reflects a purpose to discriminate on the basis of sex. Pp. 280–281.

451 F. Supp. 143, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, in which WHITE, J., joined, *post*, p. 281. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 281.

Thomas R. Kiley, Assistant Attorney General of Massachusetts, argued the cause for appellants. With him on the brief were *Francis X. Bellotti*, Attorney General, and *Edward F. Vena*, Assistant Attorney General.

Richard P. Ward argued the cause for appellee. With him on the brief were *Stephen B. Perlman, Eleanor D. Acheson, John H. Mason,* and *John Reinstein.**

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*Briefs of *amici curiae* urging reversal were filed by *Solicitor General McCree, Deputy Solicitor General Easterbrook*, and *William C. Bryson* for the United States; and by *John J. Curtin, Jr.*, for the American Legion.

Samuel J. Rabinove and *Phyllis N. Segal* filed a brief for the National Organization for Women et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Deanne Siemer* for the United States

MR. JUSTICE STEWART delivered the opinion of the Court.

This case presents a challenge to the constitutionality of the Massachusetts veterans' preference statute, Mass. Gen. Laws Ann., ch. 31, § 23, on the ground that it discriminates against women in violation of the Equal Protection Clause of the Fourteenth Amendment. Under ch. 31, § 23,[1] all veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying nonveterans. The preference operates overwhelmingly to the advantage of males.

The appellee Helen B. Feeney is not a veteran. She brought this action pursuant to 42 U. S. C. § 1983, alleging that the absolute-preference formula established in ch. 31, § 23, inevitably operates to exclude women from consideration for the best Massachusetts civil service jobs and thus unconstitutionally denies them the equal protection of the laws.[2] The three-judge District Court agreed, one judge dissenting. *Anthony* v. *Massachusetts*, 415 F. Supp. 485 (Mass. 1976).[3]

Office of Personnel Management et al.; and by *Paul D. Kamenar* for the Washington Legal Foundation.

[1] For the text of ch. 31, § 23, see n. 10, *infra*. The general Massachusetts Civil Service law, Mass. Gen. Laws Ann., ch. 31, was recodified on Jan. 1, 1979, 1978 Mass. Acts, ch. 393, and the veterans' preference is now found at Mass. Gen. Laws Ann., ch. 31, § 26 (West 1979). Citations in this opinion, unless otherwise indicated, are to the ch. 31 codification in effect when this litigation was commenced.

[2] No statutory claim was brought under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* Section 712 of the Act, 42 U. S. C. § 2000e–11, provides that "[n]othing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial or local law creating special rights or preference for veterans." The parties have evidently assumed that this provision precludes a Title VII challenge.

[3] The appellee's case had been consolidated with a similar action brought by Carol A. Anthony, a lawyer whose efforts to obtain a civil service Counsel I position had been frustrated by ch. 31, § 23. In 1975, Massachusetts exempted all attorney positions from the preference, 1975 Mass. Acts, ch. 134, and Anthony's claims were accordingly found moot by the District Court. *Anthony* v. *Massachusetts*, 415 F. Supp. 485, 495 (Mass. 1976).

The District Court found that the absolute preference afforded by Massachusetts to veterans has a devastating impact upon the employment opportunities of women. Although it found that the goals of the preference were worthy and legitimate and that the legislation had not been enacted for the purpose of discriminating against women, the court reasoned that its exclusionary impact upon women was nonetheless so severe as to require the State to further its goals through a more limited form of preference. Finding that a more modest preference formula would readily accommodate the State's interest in aiding veterans, the court declared ch. 31, § 23, unconstitutional and enjoined its operation.[4]

Upon an appeal taken by the Attorney General of Massachusetts,[5] this Court vacated the judgment and remanded the case for further consideration in light of our intervening decision in *Washington* v. *Davis*, 426 U. S. 229. *Massachusetts* v. *Feeney*, 434 U. S. 884. The *Davis* case held that a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact; instead the disproportionate impact must be traced to a purpose to discriminate on the basis of race. 426 U. S., at 238–244.

Upon remand, the District Court, one judge concurring and one judge again dissenting, concluded that a veterans' hiring preference is inherently nonneutral because it favors a class from which women have traditionally been excluded, and that the consequences of the Massachusetts absolute-preference formula for the employment opportunities of women were too inevitable to have been "unintended." Accordingly, the court reaffirmed its original judgment. *Feeney* v. *Massachusetts,* 451 F. Supp. 143. The Attorney General again appealed to this Court pursuant to 28 U. S. C. § 1253, and probable jurisdiction of the appeal was noted. 439 U. S. 891.

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[4] The District Court entered a stay pending appeal, but the stay was rendered moot by the passage of an interim statute suspending ch. 31, § 23, pending final judgment and replacing it with an interim provision granting a modified point preference to veterans. 1976 Mass. Acts, ch. 200, now codified at Mass. Gen. Laws Ann., ch. 31, § 26 (West 1979).

[5] The Attorney General appealed the judgment over the objection of other state officers named as defendants. In response to our certification of the question whether Massachusetts law permits this, see *Massachusetts* v. *Feeney*, 429 U. S. 66, the Supreme Judicial Court answered in the affirmative. *Feeney* v. *Commonwealth*, — Mass. —, 366 N. E., 2d 1262 (1977).

I

A

The Federal Government and virtually all of the States grant some sort of hiring preference to veterans.[6] The Massachusetts preference, which is loosely termed an "absolute lifetime" preference, is among the most generous.[7] It applies to all positions in the State's classified civil service, which constitute approximately 60% of the public jobs in the State. It is available to "any person, male or female, including a nurse," who was honorably discharged from the United States Armed Forces after at least 90 days of active service, at least one day of which was during "wartime."[8] Persons who are deemed veterans and who are otherwise qualified for a particular civil service job may exercise the preference at any time and as many times as they wish.[9]

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[6] The first comprehensive federal veterans' statute was enacted in 1944. Veterans' Preference Act of 1944, 58 Stat. 387. The Federal Government has, however, engaged in preferential hiring of veterans, through official policies and various special laws, since the Civil War. See, *e. g.*, Res. of Mar. 3, 1865, No. 27, 13 Stat. 571 (hiring preference for disabled veterans). See generally House Committee on Veterans' Affairs, The Provision of Federal Benefits for Veterans, An Historical Analysis of Major Veterans' Legislation, 1862–1954, 84th Cong., 1st Sess., 258–265 (Comm. Print 1955). For surveys of state veterans' preference laws, many of which also date back to the late 19th century, see State Veterans' Laws, Digests of State Laws Regarding Rights, Benefits, and Privileges of Veterns and Their Dependents, House Committee on Veterans' Affairs, 91st Cong., 1st Sess. (1969); Fleming & Shanor, Veterans' Preferences in Public Employment: Unconstitutional Gender Discrimination?, 26 Emory L. J. 13 (1977).

[7] The forms of veterans' hiring preferences vary widely. The Federal Government and approximately 41 States grant veterans a point advantage on civil service examinations, usually 10 points for a disabled veteran and 5 for one who is not disabled. See Fleming & Shanor, *supra* n. 6, at 17, and n. 12 (citing statutes). A few offer only tie-breaking preferences. *Id.*, at n. 14 (citing statutes). A very few States, like Massachusetts, extend absolute hiring or positional preferences to qualified veterans. *Id.*, at n. 13. See, *e. g.*, N. J. Stat. Ann. § 11: 27–4 (West 1976); S. D. Comp. Laws Ann. § 3–3–1 (1974); Utah Code Ann. § 34–30–11 (1953); Wash. Rev. Code §§ 41.04.010, 73.16.010 (1976).

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[8] Massachusetts Gen. Laws Ann., ch. 4, § 7, Forty-third (West 1976), which supplies the general definition of the term "veteran," reads in pertinent part:

"Veteran" shall mean any person, male or female, including a nurse, (*a*) whose last discharge or release from his wartime service, as defined herein, was under honorable conditions and who (*b*) served in the army, navy, marine corps, coast guard, or air force of the United States for not less than ninety days active service, at least one day of which was for wartime service . . . ."

Persons awarded the Purple Heart, ch. 4, § 7, Forty-third, or one of a number of specified campaign badges or the Congressional Medal of Honor are also deemed veterans. Mass. Gen. Laws Ann., ch. 31, § 26.

"Wartime service" is defined as service performed by a "Spanish War veteran," a "World War I veteran," a "World War II veteran," a "Korean veteran," a "Vietnam veteran," or a member of the "WAAC." Mass. Gen. Laws Ann., ch. 4, § 7, Forty-third (West 1976). Each of these terms is further defined to specify a period of service. The statutory definitions, taken together, cover the entire period from September 16, 1940, to May 7, 1975. See *ibid.*

"WAAC" is defined as follows: "any woman who was discharged and so served in any corps or unit of the United States established for the purpose of enabling women to serve with, or as auxiliary to, the armed forces of the United States and such woman shall be deemed to be a veteran." *Ibid.*

[9] The Massachusetts preference law formerly imposed a residency requirement, see 1954 Mass. Acts, ch. 627, § 3 (eligibility conditioned upon Massachusetts domicile prior to induction or five years' residency in State). The distinction was invalidated as violative of the Equal Protection Clause in *Stevens* v. *Campbell*, 332 F. Supp. 102, 105 (Mass. 1971). Cf. *August* v. *Bronstein*, 369 F. Supp. 190 (SDNY 1974) (up-

Civil service positions in Massachusetts fall into two general categories, labor and official. For jobs in the official service, with which the proofs in this action were concerned, the preference mechanics are uncomplicated. All applicants for employment must take competitive examinations. Grades are based on a formula that gives weight both to objective test results and to training and experience. Candidates who pass are then ranked in the order of their respective scores on an "eligible list." Chapter 31, § 23, requires, however, that disabled veterans, veterans, and surviving spouses and surviving parents of veterans be ranked—in the order of their respective scores—above all other candidates.[10]

Rank on the eligible list and availability for employment are the sole factors that determine which candidates are considered for appointment to an official civil service position. When a public agency has a vacancy, it requisitions a list of "certified eligibles" from the state personnel division. Under formulas prescribed by civil service rules, a small number of candidates from the top of an appropriate list, three if there is only one vacancy, are certified. The appointing agency

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holding, *inter alia,* nondurational residency requirement in New York veterans' preference statute), summarily aff'd, 417 U. S. 901.

[10] Chapter 31, § 23, provides in full:

"The names of persons who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the following order:—

"(1) Disabled veterans . . . in the order of their respective standing; (2) veterans in the order of their respective standing; (3) persons described in section twenty-three B [the widow or widowed mother of a veteran killed in action or who died from a service-connected disability incurred in wartime service and who has not remarried] in the order of their respective standing; (4) other applicants in the order of their respective standing. Upon receipt of a requisition, names shall be certified from such lists according to the method of certification prescribed by the civil service rules. A disabled veteran shall be retained in employment in preference to all other persons, including veterans."

A 1977 amendment extended the dependents' preference to "surviving spouses," and "surviving parents." 1977 Mass. Acts, ch. 815.

is then required to choose from among these candidates.[11] Although the veterans' preference thus does not guarantee that a veteran will be appointed, it is obvious that the preference gives to veterans who achieve passing scores a well-nigh absolute advantage.

B

The appellee has lived in Dracut, Mass., most of her life. She entered the work force in 1948, and for the next 14 years worked at a variety of jobs in the private sector. She first entered the state civil service system in 1963, having competed successfully for a position as Senior Clerk Stenographer in the Massachusetts Civil Defense Agency. There she worked for four years. In 1967, she was promoted to the position of Federal Funds and Personnel Coordinator in the same agency. The agency, and with it her job, was eliminated in 1975.

During her 12-year tenure as a public employee, Ms. Feeney took and passed a number of open competitive civil service examinations. On several she did quite well, receiving in 1971 the second highest score on an examination for a job with the Board of Dental Examiners, and in 1973 the third highest on a test for an Administrative Assistant position with a mental health center. Her high scores, however, did not win her a place on the certified eligible list. Because of the veterans' preference, she was ranked sixth behind five male veterans on the Dental Examiner list. She was not certified, and a lower scoring veteran was eventually appointed. On the 1973 examination, she was placed in a position on the list behind 12 male veterans, 11 of whom had lower scores. Following the other examinations that she took, her name was similarly ranked below those of veterans who had achieved passing grades.

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[11] A 1978 amendment requires the appointing authority to file a written statement of reasons if the person whose name was not highest is selected. 1978 Mass. Acts, ch. 393, § 11, currently codified at Mass. Gen. Laws Ann., ch. 31, § 27 (West 1979).

Ms. Feeney's interest in securing a better job in state government did not wane. Having been consistently eclipsed by veterans, however, she eventually concluded that further competition for civil service positions of interest to veterans would be futile. In 1975, shortly after her civil defense job was abolished, she commenced this litigation.

C

The veterans' hiring preference in Massachusetts, as in other jurisdictions, has traditionally been justified as a measure designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations.[12] See, *e. g.*, *Hutcheson* v. *Director of Civil Service*, 361 Mass. 480, 281 N. E. 2d 53 (1972). The Massachusetts law dates back to 1884, when the State, as part of its first civil service legislation, gave a statutory preference to civil service applicants who were Civil War veterans if their qualifications were equal to those of nonveterans. 1884 Mass. Acts, ch. 320, § 14 (sixth). This tie-breaking provision blossomed into a truly absolute preference in 1895, when the State enacted its first general veterans' preference law and exempted veterans from all merit selection requirements. 1895 Mass. Acts, ch. 501, § 2. In response to a challenge brought by a male nonveteran, this statute was declared violative of state constitutional provisions guaranteeing that government should be for the "common good" and prohibiting hereditary titles. *Brown* v. *Russell*, 166 Mass. 14, 43 N. E. 1005 (1896).

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[12] Veterans' preference laws have been challenged so often that the rationale in their support has become essentially standardized. See, *e. g.*, *Koelfgen* v. *Jackson*, 355 F. Supp. 243 (Minn. 1972), summarily aff'd, 410 U. S. 976; *August* v. *Bronstein*, *supra*; *Rios* v. *Dillman*, 499 F. 2d 329 (CA5 1974); cf. *Mitchell* v. *Cohen*, 333 U. S. 411, 419 n. 12. See generally Blumberg, De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment, 26 Buffalo L. Rev. 3 (1977). For a collection of early cases, see Annot., Veterans' Preference Laws, 161 A. L. R. 494 (1946).

The current veterans' preference law has its origins in an 1896 statute, enacted to meet the state constitutional standards enunciated in *Brown* v. *Russell*. That statute limited the absolute preference to veterans who were otherwise qualified.[13] A closely divided Supreme Judicial Court, in an advisory opinion issued the same year, concluded that the preference embodied in such a statute would be valid. *Opinion of the Justices*, 166 Mass. 589, 44 N. E. 625 (1896). In 1919, when the preference was extended to cover the veterans of World War I, the formula was further limited to provide for a priority in eligibility, in contrast to an absolute preference in hiring.[14] See *Corliss* v. *Civil Service Comm'rs*, 242 Mass. 61, 136 N. E. 356 (1922). In *Mayor of Lynn* v. *Commissioner of Civil Service*, 269 Mass. 410, 414, 169 N. E. 502, 503–504 (1929), the Supreme Judicial Court, adhering to the views expressed in its 1896 advisory opinion, sustained this statute against a state constitutional challenge.

Since 1919, the preference has been repeatedly amended to cover persons who served in subsequent wars, declared or undeclared. See 1943 Mass. Acts, ch. 194; 1949 Mass. Acts, ch. 642, § 2 (World War II); 1954 Mass. Acts, ch. 627 (Korea); 1968 Mass. Acts, ch. 531, § 1 (Vietnam).[15] The current preference formula in ch. 31, § 23, is substantially the same as that settled upon in 1919. This absolute preference—even as modified in 1919—has never been universally popular. Over the years it has been subjected to repeated legal challenges, see *Hutcheson* v. *Director of Civil Service, supra* (collecting cases), to criticism by civil service reform groups, see, *e. g.*, Report of the Massachusetts Committee on Public Service on Initiative Bill Relative to Veterans' Preference, S. No. 279 (1926); Report of Massachusetts Special Commission on Civil Service and Public Personnel Administration 37–43 (June 15, 1967) (hereinafter 1967 Report), and, in 1926 to a referendum in which it was reaffirmed by a majority of 51.9%. See *id.*, at 38. The present case is apparently the first to challenge the Massachusetts veterans' preference on the simple ground that it discriminates on the basis of sex.[16]

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[13] 1896 Mass. Acts, ch. 517, § 2. The statute provided that veterans who passed examinations should "be preferred in appointment to all persons not veterans . . . ." A proviso stated: "But nothing herein contained shall be construed to prevent the certification and employment of women."

[14] 1919 Mass. Acts, ch. 150, § 2. The amended statute provided that "the names of veterans who pass examinations . . . shall be placed upon the . . . eligible lists in the order of their respective standing, above the names of all other applicants," and further provided that "upon receipt of a requisition not especially calling for women, names shall be certified from such lists . . . ." The exemption for "women's requisitions" was retained in substantially this form in subsequent revisions, see, *e. g.*, 1954 Mass. Acts, ch. 627, § 5. It was eliminated in 1971, 1971 Mass. Acts, ch. 219, when the State made all single-sex examinations subject to the prior approval of the Massachusetts Commission Against Discrimination, 1971 Mass. Acts, ch. 221.

D

The first Massachusetts veterans' preference statute defined the term "veterans" in gender-neutral language. See

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[15] A provision requiring public agencies to hire disabled veterans certified as eligible was added in 1922. 1922 Mass. Acts, ch. 463. It was invalidated as applied in *Hutcheson* v. *Director of Civil Service*, 361 Mass. 480, 281 N. E. 2d 53 (1972) (suit by veteran arguing that absolute preference for disabled veterans was arbitrary on facts). It has since been eliminated and replaced with a provision giving disabled veterans an absolute preference in retention. See Mass. Gen. Laws Ann., ch. 31, § 26 (West 1979). See n. 10, *supra*.

[16] For cases presenting similar challenges to the veterans' preference laws of other States, see *Ballou* v. *State Department of Civil Service*, 75 N. J. 365, 382 A. 2d 1118 (1978) (sustaining New Jersey absolute preference); *Feinerman* v. *Jones*, 356 F. Supp. 252 (MD Pa. 1973) (sustaining Pennsylvania point preference); *Branch* v. *Du Bois*, 418 F. Supp. 1128 (ND Ill. 1976) (sustaining Illinois modified point preference); *Wisconsin Nat. Organization for Women* v. *Wisconsin*, 417 F. Supp. 978 (WD Wis. 1976) (sustaining Wisconsin point preference).

1896 Mass. Acts, ch. 517 § 1 ("a person" who served in the United States Army or Navy), and subsequent amendments have followed this pattern, see, *e. g.*, 1919 Mass. Acts, ch. 150, § 1 ("any person who has served . . ."); 1954 Mass Acts, ch. 627, § 1 ("any person, male or female, including a nurse"). Women who have served in official United States military units during wartime, then, have always been entitled to the benefit of the preference. In addition, Massachusetts, through a 1943 amendment to the definition of "wartime service," extended the preference to women who served in unofficial auxiliary women's units. 1943 Mass. Acts, ch. 194.[17]

When the first general veterans' preference statute was adopted in 1896, there were no women veterans.[18] The statute, however, covered only Civil War veterans. Most of them were beyond middle age, and relatively few were actively competing for public employment.[19] Thus, the impact of the preference upon the employment opportunities of nonveterans as a group and women in particular was slight.[20]

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[17] The provision, passed shortly after the creation of the Women's Army Auxiliary Corps (WAAC), see n. 21, *infra,* is currently found at Mass. Gen. Laws Ann., ch. 4, § 7, cl. 43 (West 1976), see n. 8, *supra*. "Wartime service" is defined as service performed by a member of the "WAAC." A "WAAC" is "any woman who was discharged and so served in any corps or unit of the United States established for the purpose of enabling women to serve with, or as auxiliary to, the armed forces of the United States and such woman shall be deemed to be a veteran." *Ibid.*

[18] Small numbers of women served in combat roles in every war before the 20th century in which the United States was involved, but usually unofficially or disguised as men. See M. Binkin & S. Bach, Women and the Military 5 (1977) (hereinafter Binkin and Bach). Among the better known are Molly Pitcher (Revolutionary War), Deborah Sampson (Revolutionary War), and Lucy Brewer (War of 1812). Passing as one "George Baker," Brewer served for three years as a gunner on the U. S. S. Constitution ("Old Ironsides") and distinguished herself in several major naval battles in the War of 1812. See J. Laffin, Women in Battle 116–122 (1967).

[19] By 1887, the average age of Civil War veterans in Massachusetts was already over 50. Massachusetts Civil Service Commissioners, Third Annual Report 22 (1887). The tie-breaking preference which had been established under the 1884 statute had apparently been difficult to enforce, since many appointing officers "prefer younger men." *Ibid.* The 1896

Notwithstanding the apparent attempts by Massachusetts to include as many military women as possible within the scope of the preference, the statute today benefits an overwhelmingly male class. This is attributable in some measure to the variety of federal statutes, regulations, and policies that have restricted the number of women who could enlist in the United States Armed Forces,[21] and largely to the simple

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statute which established the first valid absolute preference, see *supra,* at 266, again covered only Civil War veterans. 1896 Mass. Acts, ch. 517, § 1.

[20] In 1896, for example, 2,804 persons applied for civil service positions: 2,031 were men, of whom only 32 were veterans; 773 were women. Of the 647 persons appointed, 525 were men, of whom only 9 were veterans; 122 were women. Massachusetts Civil Service Commissioners, Thirteenth Annual Report 5, 6 (1896). The average age of the applicants was 38. *Ibid.*

[21] The Army Nurse Corps, created by Congress in 1901, was the first official military unit for women, but its members were not granted full military rank until 1944. See Binkin and Bach 4–21; M. Treadwell, The Women's Army Corps 6 (Dept. of Army 1954) (hereinafter Treadwell). During World War I, a variety of proposals were made to enlist women for work as doctors, telephone operators, and clerks, but all were rejected by the War Department. See *ibid.* The Navy, however, interpreted its own authority broadly to include a power to enlist women as Yeoman F's and Marine F's. About 13,000 women served in this rank, working primarily at clerical jobs. These women were the first in the United States to be admitted to full military rank and status. See *id.,* at 10.

Official military corps for women were established in response to the massive personnel needs of World War II. See generally Binkin and Bach; Treadwell. The Women's Army Auxiliary Corps (WAAC)—the unofficial predecessor of the Women's Army Corps (WAC)—was created on May 14, 1942, followed two months later by the WAVES (Women Accepted for Voluntary Emergency Service). See Binkin and Bach 7. Not long after, the United States Marine Corps Women's Reserve and the Coast Guard Women's Reserve (SPAR) were established. See *ibid.* Some 350,000 women served in the four services; some 800 women also served as Women's Airforce Service Pilots (WASPS). *Ibid.* Most worked in health care, administration, and communications; they were also em-fact that women have never been subjected to a military draft. See generally Binkin and Bach 4–21.

When this litigation was commenced, then, over 98% of the veterans in Massachusetts were male; only 1.8% were female. And over one-quarter of the Massachusetts population were veterans. During the decade between 1963 and 1973 when the appellee was actively participating in the State's merit selection system, 47,005 new permanent appointments were made in the classified official service. Forty-three percent of those hired were women, and 57% were men. Of the women appointed, 1.8% were veterans, while 54% of the men had veteran status. A large unspecified percentage of the female appointees were serving in lower paying positions for which males traditionally had not applied.[22]

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ployed as airplane mechanics, parachute riggers, gunnery instructors, air traffic controllers, and the like.

The authorizations for the women's units during World War II were temporary. The Women's Armed Services Integration Act of 1948, 62 Stat. 356, established the women's services on a permanent basis. Under the Act, women were given regular military status. However, quotas were placed on the numbers who could enlist, 62 Stat. 357, 360–361 (no more than 2% of total enlisted strength), eligibility requirements were more stringent than those for men, and career opportunities were limited. Binkin and Bach 11–12. During the 1950's and 1960's, enlisted women constituted little more than 1% of the total force. In 1967, the 2% quota was lifted, § 1 (9)(E), 81 Stat. 375, 10 U. S. C. § 3209 (b), and in the 1970's many restrictive policies concerning women's participation in the military have been eliminated or modified. See generally Binkin and Bach. In 1972, women still constituted less than 2% of the enlisted strength. *Id.*, at 14. By 1975, when this litigation was commenced, the percentage had risen to 4.6%. *Ibid.*

[22] The former exemption for "women's requisitions," see nn. 13, 14, *supra*, may have operated in the 20th century to protect these types of jobs from the impact of the preference. However, the statutory history indicates that this was not its purpose. The provision dates back to the 1896 veterans' preference law and was retained in the law substantially unchanged until it was eliminated in 1971. See n. 14, *supra*. Since veterans in 1896 were a small but an exclusively male class, such a pro-

On each of 50 sample eligible lists that are part of the record in this case, one or more women who would have been certified as eligible for appointment on the basis of test results were displaced by veterans whose test scores were lower.

At the outset of this litigation appellants conceded that for "many of the permanent positions for which males and females have competed" the veterans' preference has "resulted in a substantially greater proportion of female eligibles than male eligibles" not being certified for consideration. The impact of the veterans' preference law upon the public employment opportunities of women has thus been severe. This impact lies at the heart of the appellee's federal constitutional claim.

II

The sole question for decision on this appeal is whether Massachusetts, in granting an absolute lifetime preference to veterans, has discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment.

A

The equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification. *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307, 314. Most laws classify, and many affect certain groups

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vision was apparently included to ensure that the statute would not be construed to outlaw a pre-existing practice of single-sex hiring explicitly authorized under the 1884 Civil Service statute. See Rule XIX.3, Massachusetts Civil Service Law and Rules and Regulations of the Commissioners (1884) ("In case the request for any . . . certification, or any law or regulation, shall call for persons of one sex, those of that sex shall be certified; otherwise sex shall be disregarded in certification"). The veterans' preference statute at no point endorsed this practice. Historical materials indicate, however, that the early preference law may have operated to encourage the employment of women in positions from which they previously had been excluded. See Thirteenth Annual Report, *supra* n. 20, at 5, 6; Third Annual Report, *supra* n. 19, at 23.

unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. *New York City Transit Authority* v. *Beazer*, 440 U. S. 568; *Jefferson* v. *Hackney*, 406 U. S. 535, 548. Cf. *James* v. *Valtierra*, 402 U. S. 137. The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility. *Dandridge* v. *Williams*, 397 U. S. 471; *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1. In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification. *Barrett* v. *Indiana*, 229 U. S. 26, 29–30; *Railway Express Agency* v. *New York*, 336 U. S. 106. When some other independent right is not at stake, see, *e. g.*, *Shapiro* v. *Thompson*, 394 U. S. 618, and when there is no "reason to infer antipathy," *Vance* v. *Bradley*, 440 U. S. 93, 97, it is presumed that "even improvident decisions will eventually be rectified by the democratic process . . . ." *Ibid.*

Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. *Brown* v. *Board of Education*, 347 U. S. 483; *McLaughlin* v. *Florida*, 379 U. S. 184. This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Guinn* v. *United States*, 238 U. S. 347; cf. *Lane* v. *Wilson*, 307 U. S. 268; *Gomillion* v. *Lightfoot*, 364 U. S. 339. But, as was made clear in *Washington* v. *Davis*, 426 U. S. 229, and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.

Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination. *Caban* v. *Mohammed*, 441 U. S. 380, 398 (STEWART, J., dissenting). This Court's recent cases teach that such classifications must bear a close and substantial relationship to important governmental objectives, *Craig* v. *Boren*, 429 U. S. 190, 197, and are in many settings unconstitutional. *Reed* v. *Reed*, 404 U. S. 71; *Frontiero* v. *Richardson*, 411 U. S. 677; *Weinberger* v. *Wiesenfeld*, 420 U. S. 636; *Craig* v. *Boren, supra; Califano* v. *Goldfarb*, 430 U. S. 199; *Orr* v. *Orr*, 440 U. S. 268; *Caban* v. *Mohammed, supra.* Although public employment is not a constitutional right, *Massachusetts Bd. of Retirement* v. *Murgia, supra,* and the States have wide discretion in framing employee qualifications, see, *e. g., New York City Transit Authority* v. *Beazer, supra,* these precedents dictate that any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment.

B

The cases of *Washington* v. *Davis, supra,* and *Arlington Heights* v. *Metropolitan Housing Dev. Corp., supra,* recognize that when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work. But those cases signaled no departure from the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results. *Davis* upheld a job-related employment test that white people passed in proportionately greater numbers than Negroes, for there had been no showing that racial discrimination entered into the establishment or formulation of the test. *Arlington Heights* upheld a zoning board decision that tended to perpetuate racially segregated housing patterns, since, apart from its effect, the board's decision was shown to be nothing more than an application of a constitutionally neutral zoning policy. Those principles apply with equal force to a case involving alleged gender discrimination.

When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. See *Arlington Heights* v. *Metropolitan Housing Dev. Corp., supra*. In this second inquiry, impact provides an "important starting point," 429 U. S., at 266, but purposeful discrimination is "the condition that offends the Constitution." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16.

It is against this background of precedent that we consider the merits of the case before us.

III

A

The question whether ch. 31, § 23, establishes a classification that is overtly or covertly based upon gender must first be considered. The appellee has conceded that ch. 31, § 23, is neutral on its face. She has also acknowledged that state hiring preferences for veterans are not *per se* invalid, for she has limited her challenge to the absolute lifetime preference that Massachusetts provides to veterans. The District Court made two central findings that are relevant here: first, that ch. 31, § 23, serves legitimate and worthy purposes; second, that the absolute preference was not established for the purpose of discriminating against women. The appellee has thus acknowledged and the District Court has thus found that the distinction between veterans and nonveterans drawn by ch. 31, § 23, is not a pretext for gender discrimination. The appellee's concession and the District Court's finding are clearly correct.

If the impact of this statute could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral. See *Washington* v. *Davis, supra,* at 242; *Arlington Heights* v. *Metropolitan Housing Dev. Corp., supra,* at 266. But there can be but one answer to the question whether this veteran preference excludes significant numbers of women from preferred state jobs because they are women or because they are nonveterans. Apart from the fact that the definition of "veterans" in the statute has always been neutral as to gender and that Massachusetts has consistenly defined veteran status in a way that has been inclusive of women who have served in the military, this is not a law that can plausibly be explained only as a gender-based classification. Indeed, it is not a law that can rationally be explained on that ground. Veteran status is not uniquely male. Although few women benefit from the preference, the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans are men, and all nonveterans—male as well as female—are placed at a disadvantage. Too many men are affected by ch. 31, § 23, to permit the inference that the statute is but a pretext for preferring men over women.

Moreover, as the District Court implicitly found, the purposes of the statute provide the surest explanation for its impact. Just as there are cases in which impact alone can unmask an invidious classification, cf. *Yick Wo* v. *Hopkins,* 118 U. S. 356, there are others, in which—notwithstanding impact—the legitimate noninvidious purposes of a law cannot be missed. This is one. The distinction made by ch. 31, § 23, is, as it seems to be, quite simply between veterans and nonveterans, not between men and women.

B

The dispositive question, then, is whether the appellee has shown that a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts veterans' preference legislation. As did the District Court, she points to two basic factors which in her view distinguish ch. 31, § 23, from the neutral rules at issue in the *Washington* v. *Davis* and *Arlington Heights* cases. The first is the nature of the preference, which is said to be demonstrably gender-biased in the sense that it favors a status reserved under federal military policy primarily to men. The second concerns the impact of the absolute lifetime preference upon the employment opportunities of women, an impact claimed to be too inevitable to have been unintended. The appellee contends that these factors, coupled with the fact that the preference itself has little if any relevance to actual job performance, more than suffice to prove the discriminatory intent required to establish a constitutional violation.

1

The contention that this veterans' preference is "inherently nonneutral" or "gender-biased" presumes that the State, by favoring veterans, intentionally incorporated into its public employment policies the panoply of sex-based and assertedly discriminatory federal laws that have prevented all but a handful of women from becoming veterans. There are two serious difficulties with this argument. First, it is wholly at odds with the District Court's central finding that Massachusetts has not offered a preference to veterans for the purpose of discriminating against women. Second, it cannot be reconciled with the assumption made by both the appellee and the District Court that a more limited hiring preference for veterans could be sustained. Taken together, these difficulties are fatal.

To the extent that the status of veteran is one that few women have been enabled to achieve, every hiring preference for veterans, however modest or extreme, is inherently gender-biased. If Massachusetts by offering such a preference can be said intentionally to have incorporated into its state employment policies the historical gender-based federal military personnel practices, the degree of the preference would or should make no constitutional difference. Invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude.[23] Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not. The District Court's conclusion that the absolute veterans' preference was not originally enacted or subsequently reaffirmed for the purpose of giving an advantage to males as such necessarily compels the conclusion that the State intended nothing more than to prefer "veterans." Given this finding, simple logic suggests that an intent to exclude women from significant public jobs was not at work in this law. To reason that it was, by describing the preference as "inherently nonneutral" or "gender-biased," is merely to restate the fact of impact, not to answer the question of intent.

To be sure, this case is unusual in that it involves a law that by design is not neutral. The law overtly prefers veterans as such. As opposed to the written test at issue in *Davis*, it does not purport to define a job-related characteristic. To the contrary, it confers upon a specifically described group—perceived to be particularly deserving—a competitive headstart. But the District Court found, and the appellee has not disputed, that this legislative choice was legitimate. The basic distinction between veterans and nonveterans, having been found not gender-based, and the goals of the preference having been found worthy, ch. 31 must be analyzed as is any other neutral law that casts a greater burden upon women as a group than upon men as a group. The enlistment policies of the Armed Services may well have discriminated on the basis of sex. See *Frontiero* v. *Richardson*, 411 U. S. 677; cf. *Schlesinger* v. *Ballard*, 419 U. S. 498. But the history of discrimination against women in the military is not on trial in this case.

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[23] This is not to say that the degree of impact is irrelevant to the question of intent. But it is to say that a more modest preference, while it might well lessen impact and, as the State argues, might lessen the effectiveness of the statute in helping veterans, would not be any more or less "neutral" in the constitutional sense.

2

The appellee's ultimate argument rests upon the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions. Her position was well stated in the concurring opinion in the District Court:

> "Conceding . . . that the goal here was to benefit the veteran, there is no reason to absolve the legislature from awareness that the means chosen to achieve this goal would freeze women out of all those state jobs actively sought by men. To be sure, the legislature did not wish to harm women. But the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme—as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are *that* inevitable, can they meaningfully be described as unintended?" 451 F. Supp., at 151.

This rhetorical question implies that a negative answer is obvious, but it is not. The decision to grant a preference to veterans was of course "intentional." So, necessarily, did an adverse impact upon nonveterans follow from that decision. And it cannot seriously be argued that the Legislature of Massachusetts could have been unaware that most veterans are men. It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.

"Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. See *United Jewish Organizations* v. *Carey,* 430 U. S. 144, 179 (concurring opinion).[24] It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.[25] Yet nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service.

To the contrary, the statutory history shows that the benefit of the preference was consistently offered to "any person" who was a veteran. That benefit has been extended to women under a very broad statutory definition of the term veteran.[26] The preference formula itself, which is the focal point of this challenge, was first adopted—so it appears from this record—out of a perceived need to help a small group of older Civil War veterans. It has since been reaffirmed and extended only to cover new veterans.[27] When the totality of legislative actions establishing and extending the Massachusetts veterans' preference are considered, see *Washington* v. *Davis*, 426 U. S., at 242, the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women.

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[24] Proof of discriminatory intent must necessarily usually rely on objective factors, several of which were outlined in *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S. 252, 266. The inquiry is practical. What a legislature or any official entity is "up to" may be plain from the results its actions achieve, or the results they avoid. Often it is made clear from what has been called, in a different context, "the give and take of the situation." *Cramer* v. *United States,* 325 U. S. 1, 32-33 (Jackson, J.).

[25] This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of ch. 31, § 23, a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry—made as it is under the Constitution—an inference is a working tool, not a synonym for proof. When as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof.

[26] See nn. 8, 17, *supra.*

IV

Veterans' hiring preferences represent an awkward—and, many argue, unfair—exception to the widely shared view that merit and merit alone should prevail in the employment policies of government. After a war, such laws have been enacted virtually without opposition. During peacetime, they inevitably have come to be viewed in many quarters as undemocratic and unwise.[28] Absolute and permanent preferences, as the troubled history of this law demonstrates, have always been subject to the objection that they give the veteran more than a square deal. But the Fourteenth Amendment "cannot be made a refuge from ill-advised . . . laws." *District of Columbia* v. *Brooke,* 214 U. S. 138, 150. The substantial edge granted to veterans by ch. 31, § 23, may reflect unwise policy. The appellee, however, has simply failed to demonstrate that the law in any way reflects a purpose to discriminate on the basis of sex.

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[27] The appellee has suggested that the former statutory exception for "women's requisitions," see nn. 13, 14, *supra*. supplies evidence that Massachusetts, when it established and subsequently reaffirmed the absolute-preference legislation, assumed that women would not or should not compete with men. She has further suggested that the former provision extending the preference to certain female dependents of veterans, see n. 10, *supra*, demonstrates that ch. 31, § 23, is laced with "old notions" about the proper roles and needs of the sexes. See *Califano* v. *Goldfarb*, 430 U. S. 199; *Weinberger* v. *Wiesenfeld*, 420 U. S. 636. But the first suggestion is totally belied by the statutory history, see *supra*, at 267-271, and nn. 19, 20, and the second fails to account for the consistent statutory recognition of the contribution of women to this Nation's military efforts.

[28] See generally Hearings on Veterans' Preference Oversight before the Subcommittee on Civil Service of the House Post Office and Civil Service Committee, 95th Cong., 1st Sess. (1977); Report of Comptroller General, Conflicting Congressional Policies: Veterans' Preference and Apportionment vs. Equal Employment Opportunity (Sept. 29, 1977).

The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEVENS, with whom MR. JUSTICE WHITE joins, concurring.

While I concur in the Court's opinion, I confess that I am not at all sure that there is any difference between the two questions posed *ante,* at 274. If a classification is not overtly based on gender, I am inclined to believe the question whether it is covertly gender based is the same as the question whether its adverse effects reflect invidious gender-based discrimination. However the question is phrased, for me the answer is largely provided by the fact that the number of males disadvantaged by Massachusetts' veterans' preference (1,867,000) is sufficiently large—and sufficiently close to the number of disadvantaged females (2,954,000)—to refute the claim that the rule was intended to benefit males as a class over females as a class.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Although acknowledging that in some circumstances, discriminatory intent may be inferred from the inevitable or foreseeable impact of a statute, *ante,* at 279 n. 25, the Court concludes that no such intent has been established here. I cannot agree. In my judgment, Massachusetts' choice of an absolute veterans' preference system evinces purposeful gender-based discrimination. And because the statutory scheme bears no substantial relationship to a legitimate governmental objective, it cannot withstand scrutiny under the Equal Protection Clause.

I

The District Court found that the "prime objective" of the Massachusetts veterans' preference statute, Mass. Gen. Laws Ann., ch. 31, § 23, was to benefit individuals with prior military service. *Anthony* v. *Commonweath*, 415 F. Supp. 485, 497 (Mass. 1976). See *Feeney* v. *Massachusetts*, 451 F. Supp. 143, 145 (Mass. 1978). Under the Court's analysis, this factual determination "necessarily compels the conclusion that the State intended nothing more than to prefer 'veterans.' Given this finding, simple logic suggests than an intent to exclude women from significant public jobs was not at work in this law." *Ante*, at 277. I find the Court's logic neither simple nor compelling.

That a legislature seeks to advantage one group does not, as a matter of logic or of common sense, exclude the possibility that it also intends to disadvantage another. Individuals in general and lawmakers in particular frequently act for a variety of reasons. As this Court recognized in *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 265 (1977), "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern." Absent an omniscience not commonly attributed to the judiciary, it will often be impossible to ascertain the sole or even dominant purpose of a given statute. See *McGinnis* v. *Royster*, 410 U. S. 263, 276–277 (1973); Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205, 1214 (1970). Thus, the critical constitutional inquiry is not whether an illicit consideration was the primary or but-for cause of a decision, but rather whether it had an appreciable role in shaping a given legislative enactment. Where there is "proof that a discriminatory purpose has been *a* motivatin factor in the decision, . . . judicial deference is no longer just fied." *Arlington Heights* v. *Metropolitan Housing Dev. Corp supra*, at 265–266 (emphasis added).

Moreover, since reliable evidence of subjective intention is seldom obtainable, resort to inference based on objectiv factors is generally unavoidable. See *Beer* v. *United State* 425 U. S. 130, 148–149, n. 4 (1976) (MARSHALL, J., dis senting); cf. *Palmer* v. *Thompson*, 403 U. S. 217, 224–22 (1971); *United States* v. *O'Brien*, 391 U. S. 367, 383–38 (1968). To discern the purposes underlying facially neutra policies, this Court has therefore considered the degree, in evitability, and foreseeability of any disproportionate impac as well as the alternatives reasonably available. See *Monro* v. *Board of Commissioners*, 391 U. S. 450, 459 (1968); *Gos* v. *Board of Education*, 373 U. S. 683, 688–689 (1963); *Gomil lion* v. *Lightfoot*, 364 U. S. 339 (1960); *Griffin* v. *Illinois*, 351 U. S. 12, 17 n. 11 (1956). Cf. *Albemarle Paper Co.* v. *Moody* 422 U. S. 405, 425 (1975).

In the instant case, the impact of the Massachusetts statut on women is undisputed. Any veteran with a passing grade on the civil service exam must be placed ahead of a nonveteran, regardless of their respective scores. The District Court found that, as a practical matter, this preference supplants test results as the determinant of upper level civil service appointments. 415 F. Supp., at 488–489. Because less than 2% of the women in Massachusetts are veterans, the absolute preference formula has rendered desirable state civil service employment an almost exclusively male prerogative. 451 F. Supp., at 151 (Campbell, J., concurring).

As the District Court recognized, this consequence follows foreseeably, indeed inexorably, from the long history of policies severely limiting women's participation in the military.[1]

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[1] See *Anthony* v. *Massachusetts*, 415 F. Supp. 485, 490, 495–499 (Mass. 1976); *Feeney* v. *Massachusetts*, 451 F. Supp. 143, 145, 148 (Mass.

Although neutral in form, the statute is anything but neutral in application. It inescapably reserves a major sector of public employment to "an already established class which, as a matter of historical fact, is 98% male." *Ibid.* Where the foreseeable impact of a facially neutral policy is so disproportionate, the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme. Cf. *Castaneda* v. *Partida*, 430 U. S. 482 (1977); *Washington* v. *Davis*, 426 U. S. 229, 241 (1976); *Alexander* v. *Louisiana*, 405 U. S. 625, 632 (1972); see generally Brest, *Palmer* v. *Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95, 123.

Clearly, that burden was not sustained here. The legislative history of the statute reflects the Commonwealth's patent appreciation of the impact the preference system would have on women, and an equally evident desire to mitigate that impact only with respect to certain traditionally female occupations. Until 1971, the statute and implementing civil serv-

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1978). In addition to the 2% quota on women's participation in the Armed Forces, see *ante*, at 270 n. 21, enlistment and appointment requirements have been more stringent for females than males with respect to age, mental and physical aptitude, parental consent, and educational attainment. M. Binkin & S. Bach, Women and the Military (1977) (hereinafter Binkin and Bach); Note, The Equal Rights Amendment and the Military, 82 Yale L. J. 1533, 1539 (1973). Until the 1970's, the Armed Forces precluded enlistment and appointment of women, but not men, who were married or had dependent children. See 415 F. Supp., at 490; App. 85; Exs. 98, 99, 103, 104. Sex-based restrictions on advancement and training opportunities also diminished the incentives for qualified women to enlist. See Binkin and Bach 10–17; Beans, Sex Discrimination in the Military, 67 Mil. L. Rev. 19, 79–83 (1975). Cf. *Schlesinger* v. *Ballard*, 419 U. S. 498, 508 (1975).

Thus, unlike the employment examination in *Washington* v. *Davis*, 426 U. S. 229 (1976), which the Court found to be demonstrably job related, the Massachusetts preference statute incorporates the results of sex-based military policies irrelevant to women's current fitness for civilian public employment. See 415 F. Supp., *at 498–499.*

ice regulations exempted from operation of the preference any job requisitions "especially calling for women." 1954 Mass. Acts, ch. 627, § 5. See also 1896 Mass. Acts, ch. 517, § 6; 1919 Mass. Acts, ch. 150, § 2; 1945 Mass. Acts, ch. 725, § 2 (e); 1965 Mass. Acts, ch. 53; *ante,* at 266 nn. 13, 14. In practice, this exemption, coupled with the absolute preference for veterans, has created a gender-based civil service hierarchy, with women occupying low-grade clerical and secretarial jobs and men holding more responsible and remunerative positions. See 415 F. Supp., at 488; 451 F. Supp., at 148 n. 9.

Thus, for over 70 years, the Commonwealth has maintained, as an integral part of its veterans' preference system, an exemption relegating female civil service applicants to occupations traditionally filled by women. Such a statutory scheme both reflects and perpetuates precisely the kind of archaic assumptions about women's roles which we have previously held invalid. See *Orr* v. *Orr,* 440 U. S. 268 (1979); *Califano* v. *Goldfarb,* 430 U. S. 199, 210–211 (1977); *Stanton* v. *Stanton,* 421 U. S. 7, 14 (1975); *Weinberger* v. *Wiesenfeld,* 420 U. S. 636, 645 (1975). Particularly when viewed against the range of less discriminatory alternatives available to assist veterans,[2] Massachusetts' choice of a formula that so severely restricts public employment opportunities for women cannot reasonably be thought gender-neutral. Cf. *Albemarle Paper Co.* v. *Moody, supra,* at 425. The Court's conclusion to the contrary—that "nothing in the record" evinces a "collateral goal of keeping women in a stereotypic and predefined place in the

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[2] Only four States afford a preference comparable in scope to that of Massachusetts. See Fleming & Shanor, Veterans' Preferences and Public Employment: Unconstitutional Gender Discrimination?, 26 Emory L. J. 13, 17 n. 13 (1977) (citing statutes). Other States and the Federal Government grant point or tie-breaking preferences that do not foreclose opportunities for women. See *id.,* at 13, and nn. 12, 14; *ante,* at 261 n. 7; Hearings on Veterans' Preference Oversight before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service, 95th Cong., 1st Sess., 4 (1977) (statement of Alan Campbell, Chairman, United States Civil Service Commission).

Massachusetts Civil Service," *ante*, at 279—displays a singularly myopic view of the facts established below.[3]

II

To survive challenge under the Equal Protection Clause, statutes reflecting gender-based discrimination must be substantially related to the achievement of important governmental objectives. See *Califano* v. *Webster*, 430 U. S. 313, 316–317 (1977); *Craig* v. *Boren*, 429 U. S. 190, 197 (1976); *Reed* v. *Reed*, 404 U. S. 71, 76 (1971). Appellants here advance three interests in support of the absolute preference system: (1) assisting veterans in their readjustment to civilian life; (2) encouraging military enlistment; and (3) rewarding those who have served their country. Brief for Appellants 24. Although each of those goals is unquestionably legitimate, the "mere recitation of a benign, compensatory purpose" cannot of itself insulate legislative classifications from constitutional scrutiny. *Weinberger* v. *Wiesenfeld*, *supra*, at 648. And in this case, the Commonwealth has failed to establish a sufficient relationship between its objectives and the means chosen to effectuate them.

With respect to the first interest, facilitating veterans' transition to civilian status, the statute is plainly overinclusive. Cf. *Trimble* v. *Gordon*, 430 U. S. 762, 770–772 (1977); *Jimenez* v. *Weinberger*, 417 U. S. 628, 637 (1974). By conferring a permanent preference, the legislation allows veterans to invoke their advantage repeatedly, without regard to their date of discharge. As the record demonstrates, a substantial majority of those currently enjoying the benefits of the system are not recently discharged veterans in need of readjustment assistance.[4]

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[3] Although it is relevant that the preference statute also disadvantages a substantial group of men, see *ante*, at 281 (STEVENS, J., concurring), it is equally pertinent that 47% of Massachusetts men over 18 are veterans, as compared to 0.8% of Massachusetts women. App. 83. Given this disparity, and the indicia of intent noted *supra*, at 284–285, the absolute number of men denied preference cannot be dispositive, especially since they have not faced the barriers to achieving veteran status confronted by women. See n. 1, *supra*.

Nor is the Commonwealth's second asserted interest, encouraging military service, a plausible justification for this legislative scheme. In its original and subsequent re-enactments, the statute extended benefits retroactively to veterans who had served during a prior specified period. See *ante,* at 265–267. If the Commonwealth's "actual purpose" is to induce enlistment, this legislative design is hardly well suited to that end. See *Califano* v. *Webster, supra,* at 317; *Weinberger* v. *Wiesenfeld, supra,* at 648. For I am unwilling to assume what appellants made no effort to prove, that the possibility of obtaining an *ex post facto* civil service preference significantly influenced the enlistment decisions of Massachusetts residents. Moreover, even if such influence could be presumed, the statute is still grossly overinclusive in that it bestows benefits on men drafted as well as those who volunteered.

Finally, the Commonwealth's third interest, rewarding veterans, does not "adequately justify the salient features" of this preference system. *Craig* v. *Boren,* 429 U. S., at 202–203. See *Orr* v. *Orr, supra,* at 281. Where a particular statutory scheme visits substantial hardship on a class long subject to discrimination, the legislation cannot be sustained unless " 'carefully tuned to alternative considerations.' " *Trimble* v. *Gordon, supra,* at 772. See *Caban* v. *Mohammed,* 441 U. S. 380, 392–393, n. 13 (1979); *Mathews* v. *Lucas,* 427 U. S. 495 (1976). Here, there are a wide variety of less discriminatory means by which Massachusetts could effect its compensatory purposes. For example, a point preference system, such as that maintained by many States and the Federal Government, see n. 2, *supra*, or an absolute preference for a limited duration, would reward veterans without excluding all qualified women from upper level civil service positions. Apart from public employment, the Commonwealth, can, and does, afford assistance to veterans in various ways, including tax abatements, educational subsidies, and special programs for needy veterans. See Mass. Gen. Laws Ann., ch. 59, § 5, Fifth (West Supp. 1979); Mass. Gen. Laws Ann., ch. 69, §§ 7, 7B (West Supp. 1979); and Mass. Gen. Laws Ann., chs. 115, 115A (West 1969 and Supp. 1978). Unlike these and similar benefits, the costs of which are distributed across the taxpaying public generally, the Massachusetts statute exacts a substantial price from a discrete group of individuals who have long been subject to employment discrimination,[5] and who, "because of circumstances totally beyond their control, have [had] little if any chance of becoming members of the preferred class." 415 F. Supp., at 499. See n. 1, *supra*.

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[4] The eligibility lists for the positions Ms. Feeney sought included 95 veterans for whom discharge information was available. Of those 95 males, 64 (67%) were discharged prior to 1960. App. 106, 150–151, 169–170.

In its present unqualified form, the veteran's preference statute precludes all but a small fraction of Massachusetts women from obtaining any civil service position also of interest to men. See 451 F. Supp., at 151 (Campbell, J., concurring). Given the range of alternatives available, this degree of preference is not constitutionally permissible.

I would affirm the judgment of the court below.

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[5] See *Frontiero* v. *Richardson*, 411 U. S. 677, 689 n. 23 (1973); *Kahn* v. *Shevin*, 416 U. S. 351, 353–354 (1974); United States Bureau of the Census, Current Population Reports, No. 107, Money Income and Poverty Status of Families and Persons in the United States: 1976 (Advance Report) (Table 7) (Sept. 1977).

THE IMPACT OF THE EQUAL RIGHTS AMENDMENT: SOCIAL SECURITY

TUESDAY, MARCH 20, 1984

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, in room SD-430, Dirksen Building, commencing at 9:42 a.m., Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Thurmond (chairman of the full committee), and DeConcini.

Staff present: Stephen Markman, chief counsel and Carol Epps, chief clerk.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. Ladies and gentlemen, this marks the sixth day of hearings by the Subcommittee on the Constitution on the meaning of the proposed equal rights constitutional amendment.

As with our earlier hearings, the objective of this hearing is to establish some form of legislative history on the intentions of the Congress in proposing this measure as the 27th amendment to the U.S. Constitution.

The subject of today's hearing is not one to which a great deal of attention has previously been focused. Our two witnessss this morning will address the impact of the equal rights amendment upon the Social Security Program in this country.

This hearing is prompted by the statements of a number of leading proponents of the ERA to the effect that the amendment will have a substantial impact on the operation of Social Security policy in the United States.

As with our earlier hearings, we will limit ourselves to two witnesses, one whom I have selected and one who has been selected by the proponents of the equal rights amendment on this committee. In this way, I believe the committee can continue to explore in detail and thoroughness the issues before us. Only by such a process can the Members of this body obtain a clearer idea of what changes will be required in public policy should the 52 words of the ERA become part of the Constitution.

Before we begin today's hearing I would simply like to observe for the record that an important decision has recently been handed down in the State of Pennsylvania that touches upon the matter of one of our recent hearings, the impact of the equal rights amendment upon abortion policy. On March 9, the Commonwealth Court of Pennsylvania ruled that the Pennsylvania equal rights amendment was violated by State limitations on abortion funding. The decision in *Fisher* v. *Commonwealth* concluded that the State ERA rendered unconstitutional laws that "discriminated against women with respect to a physical condition unique to women."

Thus the process of understanding the equal rights amendment continues.

Before we begin I wish to place a statement of Senator DeConcini in the record.

[Prepared statement follows:]

PREPARED STATEMENT OF SENATOR DENNIS DECONCINI

Mr. Chairman, as lawmakers we have a responsibility to identify and discern as best we can all the possible ramifications of a proposed piece of legislation before enacting it. This responsibility is even greater when we, as now, are considering a proposed amendment to the United States Constitution since a single alteration of this document can affect literally hundreds of laws. The hearings held so far on the ERA's potential impact on the right of women to have abortions and the legitimacy of veteran preference programs have been quite valuable and this Senator appreciates the cooperation and leadership of the distinguished chairman in conducting them.

Today we are looking into how the ERA could affect one of the most important and far-reaching governmental programs—Social Security. Specifically, we are inquiring whether the ERA would mandate a change in how benefits are computed and paid out under the Old Age, Survivors and Disability Insurance (OASDI) component of Social Security. We are fortunate to have witnesses who have a great deal of knowledge about the existing structure of OASDI and I welcome them.

Before we begin, I might add that the complexities of the Social Security system are beyond my expertise. It is also an area of legislation with which this subcommittee does not usually deal. This morning we will hear testimony about whether OASDI program discriminates against women or men or both. Regardless of the answer, it should be noted that substantial improvements have been made in this area. In the last two decades Social Security has been revamped to eliminate the most blatant inequalities. Last year Congress amended the Social Security Act so that now virtually every section is gender-neutral. In addition, the Senate Finance Committee is presently considering whether further revision is needed to ensure that men and women are treated equally under the system.

I support this process of weeding out all sex-based discrimination inherent in the OASDI program and hope that further refinements are made in this direction whether or not the equal rights amendment mandates such action.

Senator **HATCH**. Ladies and gentlemen, I wish to introduce our two witnesses for this morning.

Our first witness will be Ms. Jane C. Sherburne, a Washington attorney and a former assistant to Congressman, now mayor of Minneapolis, Donald Fraser. As assistant to Representative Fraser, Ms. Sherburne was active in the introduction of major Social Security reform proposals. She has also served as an Assistant Director in the Social Security Administration.

Our second witness will be Mrs. Judith B. Finn. Mrs. Finn is the author of the book entitled "The Treatment of Women Under Social Security." Mrs. Finn is a political scientist and an economist who has taught at Kenyon College in Ohio. She has also worked as a public policy research analyst at Michigan State University and the University of Wisconsin.

We are privileged to have both of these witnesses today. A scheduled third witness, Mr. Robert Myers of the Social Security Administration and probably the Nation's leading authority on the Social Security System may appear before this committee at a subsequent hearing. He has submitted thoughtful prepared testimony on this matter.

So Ms. Sherburne and Mrs. Finn, if we could have you take these two microphones. We will be happy to listen to you first, Ms. Sherburne and then we will go to Mrs. Finn.

Please proceed.

STATEMENTS OF JANE C. SHERBURNE, ESQ., WASHINGTON, DC; AND JUDITH B. FINN, ECONOMIST AND AUTHOR

Ms. **Sherburne**. Mr. Chairman, I have a written statement that I would like to submit for the record and summarize my statement here.

Senator **Hatch**. Without objection we will put both of your formal statements in the record, and we do appreciate your summarizing them as it allows us more time for questions.

Ms. **Sherburne**. Thank you.

Mr. Chairman, I am pleased to be here at these hearings. I hope I can help you understand the Social Security Program and how it treats women and to what extent the equal rights amendment might affect that treatment of women.

As you indicated, I have studied this issue in several different capacities: First as an aide to former Congressman Don Fraser and then I served as executive assistant to the Commissioner in the Social Security Administration at the time when the HEW report "Social Security and the Changing Roles of Men and Women" was released. I also served as Assistant Director of the Office of Policy Analysis in the Social Security Administration, studying the 1979 Social Security Advisory Council recommendations on Social Security and women. The Advisory Council proposed incremental changes to improve the treatment of women under Social Security and we spent a great deal of time studying how those changes could be implemented and what the impact of those changes would be.

Along with these activities I have written on the subject of women and Social Security and participated in other activities to enhance public understanding of the treatment of women under the program. This question is very important. Social Security is a major institution of our society. With 36 million beneficiaries and $178 billion of expenditures financed by taxpayers, certainly nearly every American is affected by this program. Therefore, it is critically important that there is a consensus among Americans that the program is fairly structured.

Women do have reasons to be dissatisfied with the structure of the program. Social Security fails to recognize that women participate in our society differently than men. The architects of the program expected women to receive benefits as dependents of their husbands. Whether the benefit is called a dependent benefit or a spouse benefit does not change the fact that the route of access to the benefit is the primary wage earner, which is almost always the husband. Payment of the benefit is dependent on the husband's status as a paid worker. It is the husband that must retire, die, or become disabled before a wife can receive a benefit. This is not a

818

problem that disappears simply by calling the benefit something else.

The structure of Social Security also fails to recognize the economic value of work performed in the home. If the spouse benefit were truly based on a presumption that the homemaker is providing an economic contribution to the family, then the benefit would be payable to the homemaker and her family when she becomes disabled, dies, or retires. But benefits are payable only when the wage earner spouse becomes disabled, retires or dies, reflecting a perception that the family need not be protected from the loss of a homemaker's contribution

The structure of Social Security also fails to accommodate typical work patterns of American women: years of unpaid work combined with years of paid work over a lifetime. This pattern is different from the pattern of men and I suspect that the work patterns of women will always be different from the work patterns of men. But the pattern means that the Social Security protection that women acquire from paid work is less than that acquired by men because it is based on fewer and lower wage earning years. Thus, either route to Social Security protection for women—as a dependent spouse or as a paid worker—leaves women with less protection than the system provides men. A brief look at a few basic features of the program reveals how its structure is poorly tailored to these life styles of American women.

First of all, the insured status requirements. Workers have to be insured to receive benefits. A worker becomes insured by working the required number of quarters in covered employment. There is an additional requirement of recent work to become entitled to disability and young survivor benefits. These requirements operate as a complete bar to Social Security protection for a woman and her family if she is an unpaid homemaker. The requirements inhibit protection for a woman who has combined paid and unpaid work roles, because any absence from the work force will jeopardize a woman's ability to meet the insured status requirements.

A look at the method of benefit computation is another way to see how the structure of Social Security is ill suited to the work patterns of women. Benefits are based on average lifetime wages. The zero earning years that a woman is an unpaid homemaker operate to pull down her lifetime average earnings and thus her benefit amount. When she does work her wages will be low, further contributing to lower lifetime average wages than those on which benefits payable to men are based.

Divorced women have access to benefits only if the marriage lasted at least 10 years. But most divorces occur before 10 years of marriage and it is the early years of the marriage that a woman is most likely to forego working for pay in order to stay home with young children. Women at divorce lose this Social Security protection that the system was supposed to provide them if they did not acquire it in their own right. Men lose nothing at divorce.

Women are also vulnerable if they become widowed. Twenty three percent of aged widows live in poverty. A survivor is not eligible for Social Security widow's benefits until age 60. Women widowed before age 60 are in serious trouble if they spent most of their lives as unpaid homemakers.

All these features combine to send a very clear message to women: choose not to be a homemaker because such a role jeopardizes your Social Security protection. This message is unfortunate. Women or men should not be penalized for choosing to be homemakers. Social Security ought to be a neutral factor in that choice.

The wheels of reform have begun to turn. The issue has received serious attention from every major body that has looked at Social Security in the last several years. The 1979 Advisory Council on Social Security spent a majority of its time on the issue of women and their treatment under the program. The President's Commission Pension Policy spent a major portion of its time on the issue and President Reagan's National Commission on Social Security Reform addressed this issue in great detail. All of these bodies acknowledge that the program fails women and each has made important contributions to moving us toward reform. Reform is underway.

The Department of Health and Human Services will be issuing a study in July that has been mandated by the Congress. CBO is reviewing reform options. The Urban Institute has been involved in analyzing the cost of various reform options and a technical committee that is composed of non-Government and Government experts has been at work devising a reform package. Passage of the equal rights amendment would intensify these efforts.

Social Security severely disadvantages women no matter how they work out their roles as paid or unpaid workers. The legislative history that you are making in these hearings to guide the application of the equal rights amendment should be clear that the amendment will reach programs such as Social Security that fail women because they are rooted in stereotypical notions of how men and women participate in our society and how that participation is valued.

The equal rights amendment would not require any particular reform. Reform must be undertaken very carefully. There are a lot of people out there that are very dependent on Social Security benefits and reform must be very aware of that. The task of reform has already begun.

Thank you, Senator.

[The following was received for the record:]

STATEMENT OF JANE C. SHERBURNE
before the
SUBCOMMITTEE ON THE CONSTITUTION
of the
SENATE JUDICIARY COMMITTEE
March 20, 1984

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE: I am Jane Sherburne and I am a Washington attorney. Over the past several years I have spent a great deal of time addressing the treatment of women under the social security program. As an aide to former-Congressman Donald Fraser I provided the staff work that led to his introduction of an "earnings sharing" reform proposal. As Executive Assistant to the Commissioner of Social Security I oversaw the completion and release of the major then-HEW report, Social Security and the Changing Roles of Men and Women. As Assistant Director of the Office of Policy Analysis in the Social Security Administration I studied the impact of and ways to implement Advisory Council recommendations to alter the social security benefit structure to improve treatment of women. I have published on the subject[1] and participated in numerous activities designed to improve public understanding of social security and the ways in which it could be redesigned so that its protection could be offered to men and women fairly. I welcome the opportunity to appear before your Subcommittee to offer a view of the current program's treatment of women and explore with you how passage of the Equal Rights Amendment would affect that treatment.

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[1] "Women and Social Security: Seizing the Moment for Change," 70 Geo. L.J. 1563 (1982).

The social security program is a basic institution of our society designed to protect the vast majority of Americans against major risks to economic security: death, disability and retirement of a breadwinner. The program touches almost every American in a substantial way, either as one of the more than thirty-six million social security beneficiaries, or as one of the taxpayers that must finance its $178 billion expenditures.[1] Because of the pervasive way in which the social security program is woven into the fabric of our society it is very appropriate and important to carefully scrutinize the problems with the present program's treatment of women and the assist that the Equal Rights Amendment would provide to reform.

The way in which social security provides benefits reveals that the program was structured around stereotypical notions of the role of women in our society and the value of a

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[1] 1984 outlays for social security are estimated at $178.2 billion. Budget for the United States Government Fiscal Year 1984 at 5-115.

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homemaker's contribution to the family. The program's architects expected women generally to receive benefits as dependents of their husbands. Dependent spouse benefits were designed for couples in which the woman would never work for pay and that never divorced. The architects did not contmeplate a need for their prototypical woman in the home to acquire, and so did not provide her with, access to the program's full array of survivor, disability and retirement protections in her own right. Nor did they anticipate a need to accommodate what is now the typical pattern among American women: years of unpaid work in the home combined with years of paid work over a lifetime.[3]

Despite the significant labor force participation of women, the paid work behavior of women is and perhaps always will be less vigorous than that of men.[4] Women comprise the

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[3] Sixty-four percent of all married women are now in the workforce (Bureau of the Census, U.S. Department of Commerce, Current Population Rep., Series P-60, No. 129, Money Income of Families and Persons in the United States: 1979, at 120 (1981)), and half of all married women with preschool age children are working for pay (BLS, U.S. Department of Labor, Report 631, Employment in Perspectives: Working Women 1 (Fourth Quarter 1980). *Cf*. BLS, U.S. Dept. of Labor, Bulletin 2080, Perspectives on Working Women: A Databook 27 (1980) (in 1979, 59% of women with school-age children in labor force)).

[4] *See* Wash. Post, Mar. 2, 1982 at A15, col. 1 (Social Security Administration reports that average benefit for women will remain at two-thirds of average benefit for men well into next century because women will continue to work intermittently and at lower wages).

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bulk of the part-time labor force,[5] and many women when it is economically possible do spend years when children are young out of the labor force altogether. Further, when they work for pay, wages paid to women are typically low.[6] Although most women are projected to have some attachment to the labor force during their lives,[7] its often intermittent nature and low pay jeopardize the access women and their families have to social security benefits when they retire, become disabled or die.

Thus, although women may acquire access to benefits as either insured workers or derivately as wives of insured workers, neither route to protection, as a dependent spouse or as a paid worker leaves women with the degree of protection

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[5] In 1981, 68% of the part-time labor force were women. BLS, United States Dept. of Labor, Employment and Earnings, November 1981, at 19, Table A-8 (1981).

[6] In 1980, women full-time workers earned only 58% of what men full-time workers earned. Telephone interview with Dan Burkhead, Survey Statistician, Current Income Staff, Population Division, United States Bureau of the Census.

[7] The Bureau of Labor Statistics projects that a woman who was age 16 in 1977 with a life expectancy of 78.5 years will spend a average of 27.7 years in the labor force and 34.7 years out of the labor force. Smith, "New Work Life Estimates Reflect Changing Profiles of Labor Force," 105 *Monthly Labor Review*, 15, 16, 17 (March 1982). Unpublished statistics from the 1981 annual average tables of the Current Population Survey show that only 3.3 percent of women between the ages of 35 and 44 have never worked for pay. Telephone interview with Shirley J. Smith, Bureau of Labor Statistics, United States Department of Labor.

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against economic insecurity that the program generally provides to men. A closer look at how the program operates and how benefits are computed shows why the present program produces this result.

Insured status is the ticket to social security protection.[6] A worker acquires insured status by working the required number of quarters in employment covered by social security. When the social security system has fully matured, a worker will be required to have forty quarters to be fully insured[7] and thus gain entitlement to retirement, disability and survivor benefits for him or her self and dependents.

This requirement is modified to gain eligibility for survivor benefits payable when a worker is survived by a dependent spouse and young children. A family is entitled to these benefits if the deceased spouse worked in covered employment for six of the twelve quarters preceding his or her death.

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[6] The basic provisions of the social security program described in this testimony are codified at 42 U.S.C. §§ 401-432 (1976 & Supp. IV 1980), as amended by 42 U.S.C.A. §§ 401-432 (West Supp. 1983).

[7] Prior to full maturity in 1991, workers who reach age 62 before 1991 gain insured status if they have accumulated, upon reaching age 62, the equivalent of one quarter of coverage for year after 1950 (33 quarters in 1984).

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Similarly, if a disabled worker is younger than age thirty, he or she need only to have worked six out of the twelve quarters preceding the disability to become entitled to benefits for him or her self and family. If the worker is over age 29, however, he or she gains disability protection only when twenty of the forty quarters immediately preceding the disability have been worked in covered employment.

These insured status requirements are not onerous for those with steady attachments to the workforce. The requirements, however, do act as a complete bar to benefits for a woman and her family upon her own death, disability or retirement if she has spent a substantial portion of her adult life as an unpaid homemaker. These insured status requirements signal the perception that a homemaker's contribution carries no value and that its loss need not be compensated. This perception contradicts what is today the widely held view that marriage is an economic partnership. Each partner provides the family unit something of great value and the loss of either contribution is devastating to the family.

More typically, women will combine roles of homemaker and paid worker over their lifetimes. This pattern works to jeopardize their ability to maintain insured status. Women, whose paid work may have gained them insured status for

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survivor and disability protection, may lose that status when they interrupt their paid work for a period of unpaid work as homemakers. For that period and until they regain insured status after returning to the workforce for the required number of quarters, they and their families remain vulnerable to economic loss suffered if the woman dies, or becomes disabled. These women and their dependents are penalized for their contribution to the family as unpaid homemakers.

Once eligibility is achieved, the amount of the benefit, referred to as the "primary insurance amount" (PIA), is computed on the basis of the worker's lifetime earnings. To compute retirement benefits, the wages earned by a worker in social-security-covered employment between 1951 and age 62 will be averaged, less the five lowest earning years during that period.[10] The retired worker then receives a benefit equal to 100 percent of his or her PIA. Additional benefits equal to 50 percent of the worker's PIA are payable to his or her dependent spouse and children.[11]

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[10] When the system is fully mature, beginning in 1991, wages earned between the ages of 21 and 62 will be averaged.

[11] Total benefits payable are subject to a maximum amount which ranges from 105% to 188% of the workers PIA, depending on the worker's prior earnings. The dual entitlement provision operates to preclude payment of dependent benefits to persons who are entitled to a benefit in their own right that exceeds the amount of the dependent benefit.

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The PIA for disability benefits is derived by averaging wages earned by the worker between 1951, or after attainment of age 21, up to the year prior to disability, less a maximum of three years during which the worker was caring for a young child. The worker receives a benefit amount equal to 100 percent of his or her PIA. The worker's spouse and children are each entitled to a benefit equal to 50 percent of the worker's PIA.[12]

The amount of the survivor benefit is similarly computed. The averaged wages are those earned by the worker between 1951, or after attainment of age 21, up to the year of the worker's death or age 62. Surviving spouses and their young children each receive 75 percent of the deceased worker's PIA.[13] The older widow receives 100 percent of the deceased worker's PIA.

This method of computing benefits, based on average lifetime wages, operates to disadvantage women. Woman who are unpaid homemakers for longer than five years accumulate zero-earning years which reduce their benefit amounts by

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[12] Disability benefits payable on the basis of one PIA are limited to the lesser of 85% of average earnings or 150% of PIA.

[13] Total benefits payable are subject to the limitations described supra note 11.

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reducing the average wages earned in covered employment. Further, intermittent absence from the labor market means that women forego wage increases which would have led to higher benefit amounts. In addition, a woman returning to the labor market may have to accept lower entry level wages that translate into a lower benefit amount. Again, social security penalizes women by failing to treat the unpaid contribution of the homemaker as anything but zero.

These features of the program, the insured status requirements and the benefit computation period, are ill-suited to the paid and unpaid work patterns of women.[14] The program provides that women will either receive nothing because they have failed to meet the requirements for or maintain insured status, or be entitled only to a low spouse benefit as a dependent when their spouse (not they) becomes disabled, retires or dies, or they will receive a low worker's benefit that is typically based on low wages and zero-earning years that pull down wage record averages.[15]

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[14] The Bureau of Labor Statistics projects that a women who was age 16 in 1977 with a life expectancy of 78.5 years will spend an average of 27.7 years in the labor force and 34.7 years out of the labor force. Smith, "New Work Life Estimates Reflect Changing Profiles of Labor Force," 105 Monthly Lab. Rev. 15, 16, 17 (March 1982). Unpublished statistics from the 1981 annual average tables of the Current Population Survey show that only 3.3 percent of women between the ages of 35 and 44 have never worked for pay.

[15] The dual entitlement provision operates to preclude payment of dependent benefits to persons who are entitled to a

[Footnote continued next page]

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Divorced women face even greater barriers to economic security. Social security benefits are available to divorced spouses only if the marriage to the insured worker lasted at least 10 years.[16] Most divorces, however, occur during the first ten years of marriage.[17] And it is usually those early years of marriage that many women sacrifice the opportunity to build their own social security records by staying out of the paid work force to raise children. Unlike their husbands, whose protection is unaffected by divorce, women lose protection that the system was designed to provide for spouses who spent time as unpaid homemakers. This result is further evidence of how the program fails to recognize the critical and valuable nature of the homemaker's contribution.

Even when the marriage lasts more than ten years, the benefit then available to the divorced spouse is in an amount

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[Footnote continued from preceding page]

benefit in their own right that exceeds the amount of the dependent spouse benefit.

[16] The divorced spouse benefit is 50% of the worker's PIA.

[17] Sixty-five percent of all divorces occur after less than 10 years of marriage. Bureau of the Census, U.S. Dept. of Commerce, Current Population Rep., Series P-20, No. 297, Number, Timing and Duration of Marriage and Divorces in the United States: 1975 Table O, at 14 (1975).

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that was designed to be combined with the benefit amount of the insured worker in the same household. The divorced spouse who spent a substantial portion of her time as an unpaid homemaker escapes the poverty to which she is destined by either remarrying a worker with sufficient social security protection or other provision for a comfortable retirement that will provide for her as well or by going to work for pay that will undoubtedly be low because she will have few marketable skills.

Aged survivors of deceased workers are entitled to a benefit that is 100 percent of the worker's PIA. Yet aged widows are the poorest of the poor with close to twenty-three percent living in poverty.[18] The startling incidence of poverty among aged widows serves as further evidence of the penalty our system imposes upon women for labor force participation that is less vigorous than that of men. This penalty is felt even more acutely by women who become widowed before the age of sixty, the age at which they may begin receiving widow's benefits. These widows have no access to other social security benefits. If a woman becomes widowed in middle age having spent a long period of her life as a homemaker, her skills may be too limited to qualify her for work with pay adequate to

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[18] Bureau of the Census, U.S. Dept. of Commerce, Current Population Rep., Series P-60, No. 144, characteristics of the population below the poverty level (1982).

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support herself and her family. Because a choice to be an unpaid homemaker carries no protection and such enormous risk, women have been put in a position that to make such a choice would be nothing short of foolhardy.

Built on stereotypical notions of women's contributions to their families, the structure of social security, which anticipates that women will receive benefits as dependents of their working spouses, is not responsive to the paid and unpaid work patterns produced by the more flexible nature of women's roles in contemporary society. Public policy ought to promote, not discourage, this flexibility. Social security should operate as a neutral factor in a family decision to have one spouse spend time out of the paid labor force. But the program, as presently structured, is not neutral. Rather, it encourages labor force participation of both spouses because the family suffers a penalty when one spouse forgoes wage-earning years.

Policymakers have begun to acknowledge that the social security program is outdated and maladapted to the economic and social realities of American families. A variety of reform proposals have been introduced in the Congress. The 1979 Advisory Council on Social Security spent more time addressing the issue of the treatment of women under social

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security than it spent on any other issue.[19] The President's Commission on Pension Policy devoted a major portion of its report to exploring reform options.[20] A major share of the work of the Justice Department's Task Force on Sex Discrimination has been devoted to developing reform alternatives.[21] Just last year, President Reagan's bipartisan National Commission on Social Security Reform considered reform of the program's treatment of women high on its agenda.[22] In response to the National Commission's report, the Congress included in the Social Security Amendments of 1983 a statutory mandate that the Department of Health and Human Services undertake a study that would guide decision makers in this complex area.[23] Further, reform of social security is a major agenda item of numerous women's groups and has recently become the subject of a variety

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[19] House Comm. on Ways and Means, 96th Cong., 1st Sess., Report of the 1979 Advisory Council on Social Security 85 (Comm. Print 1980) (transmitted by Secretary of Health, Education and Welfare Dec. 7, 1979).

[20] President's Commission on Pension Policy: An Interim Report (May 1980).

[21] S. Kaltenborn, Preliminary Report on Women and Social Security, U.S. Dep't of Justice, Task Force on Sex Discrimination (1980).

[22] Report of the National Commission on Social Security Reform (January 1983).

[23] Social Security Amendments of 1983, Pub. L. No. 98-21, § 343 (1983).

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of scholarly works.[24] This leaves little doubt that there is a widely held perception that the current program requires reform and that the momentum has been created to begin the difficult process of crafting that reform.

Passage of the Equal Rights Amendment would intensify the serious efforts already underway to develop reforms that would improve the treatment of women under social security. The program severely disadvantages women in whatever way they work out roles as paid and unpaid workers. The legislative history you are making to guide the application of the Equal Rights Amendment should be clear that the Amendment will reach programs such as social security that fail women because they are rooted in stereotypical notions of how men and women participate in our society and how that participation is valued.

The Equal Rights Amendment would not require any particular reform. Consideration could be given to a variety of ways to restructure the program to eliminate its discriminatory effects. Clearly any reform would have to be undertaken carefully in light of the complexity of the program and the critical role it plays in the lives of its beneficiaries. The task of reform has already begun. The Equal Rights Amendment would provide a renewed sense of urgency and commitment to these efforts that are already spurred by the public perception that the treatment of women under social security must be improved.

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[24] *See, e.g.*, Mikulski and Brown, "Case Studies in the Treatment of Women Under Social Security Law: The Need for Reform," 6 Harv. Women's L.J. 29 (1983); *A Challenge to Social Security: The Changing Roles of Women and Men in American Society*, (Burkhauser and Holden, eds.) New York, London and Sydney: Harcourt Brace Jovanovich, Academic Press (1982); Blumberg, "Adult Derivative Benefits in Social Security," 32 Stan. L. Rev. 233 (1980).

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Senator HATCH. Thank you.
Mrs. Finn?

STATEMENT OF JUDITH B. FINN

Mrs. FINN. Thank you, Mr. Chairman.

My name is Judith Finn. I am a homemaker from Oak Ridge, TN. I was trained as an economist and political scientist and I worked for several years doing public policy research and teaching political science before I became a mother 7 years ago. I have written a book entitled "The Treatment of Women Under Social Security" and am chairman of the Task Force on Social Security for Eagle Forum, a national organization of women with traditional moral and family values, most of whom are homemakers.

The CHAIRMAN. If you do not mind, speak into your microphone a little more so that we can hear you. Thank you very much.

Mrs. FINN. The charge that Social Security discriminates against women is frequently made. This is contrary to the long-acknowledged fact that Social Security has been made sex neutral through various congressional amendments to the Social Security Act and by several Supreme Court decisions. Informed opinion is nearly unanimous in recognizing these facts.

Many of the changes in Social Security that have been made in response to the quest for sex neutrality have benefited men, not women. For example, until 1972, women could drop 3 more years than men from the averaging period for figuring retirement benefits. This provision has been designed to compensate women for their intermittent pattern of labor forces participation. In order to ensure the sex neutrality of Social Security, the number of years that both men and women could drop was set at five. Women in the aggregate thus became worse off as a result of this change.

For better or worse women are now treated the same as men under Social Security law. Women who choose to have a career or who must work for a considerable part of their lives have the same Social Security protection that comparable men have, and their benefits are calculated in exactly the same manner regardless of their sex. Both men and women in the labor force have disability insurance and survivor benefit protection, and both men and women are eligible for the "wife's benefit."

The frequent and exaggerated charges of discrimination and inequities against women have elevated the problems that certain groups, made up primarily of women, have under Social Security above countless other concerns of equal importance. These are not matters of sex discrimination in the present system, and the answers cannot be found in further sex neutrality. The fact is that many of the problems experienced by women under Social Security arise because women are treated the same as men, at the same time that their labor force participation pattern is substantially different from men.

Many feminists have now conceded the obvious—that Social Security is sex neutral. They now argue that Social Security has a disparate impact or effect on women. For example, at the House Judiciary hearing on ERA, Ann Freedman argued that:

> Because of the disparate effect of the Social Security Act on women, and their association with sex discriminatory attitudes and practices, the ERA will require Congress to review these provisions and substitute others that treat women more fairly.

Tish Sommers testified that Social Security was an example of how a sex neutral law can have a disparate impact on women. She complains about the "presumption of women's dependency" and that women receive lower average benefits than men. She says:

> The most important shortcoming is lack of recognition of the economic contribution to the family of the homemaker.

In order to evaluate the charge that Social Security has a disparate impact on women it is necessary to measure how Social Security affects women in the aggregate. One way is to determine whether women as a group get as favorable a return for the taxes they pay into Social Security as men do.

When measured this way, women get an even higher return from Social Security taxes than men, because women tend to live longer and retire earlier than men and therefore collect benefits longer.

Because their average earnings are lower, women also receive a greater advantage from the weighted-benefit formula which is designed to favor persons with low earnings records regardless of whether this is due to a low-wage rate or to a part time or intermittent work record.

These two factors outweigh the fact that more secondary benefits are paid on the basis of men's earnings record than women's.

If we compare the total taxes paid to the total benefits received by all women beneficiaries, either on the basis of their own or their husbands' earnings, women pay about 28 percent of the taxes and receive about 54 percent of the benefits. Over the next 75 years, women will pay 33 percent of the taxes and receive about 50 percent of the benefits.

When measured in terms of the return from Social Security taxes, it simply cannot be argued that women in the aggregate are disadvantaged by Social Security or that there is a disparate impact on women.

Some women receive benefits from Social Security without paying any Social Security taxes. Congresswoman Schroeder has asserted that this is the only reason women receive higher total benefits than men. However, when we restrict the comparison to women working in covered employment, we still find no evidence that women are shortchanged under Social Security. If we compare the taxes paid by working women to the benefits based on their earnings and received by all types of beneficiaries, we find that the cost of paying benefits to women workers and their dependents is higher than the cost of paying benefits to men workers and their dependents. Indeed, if separate systems were established, women workers would have to pay Social Security taxes that are about 9 percent higher than men would have to pay. Since women pay the same Social Security tax rate as men, this means that women in the labor force get a higher return for their taxes than men do. Therefore, it cannot be said that the present Social Security system is unfair to women workers as compared to men workers, or that there is a disparate impact on women workers. Indeed women, both in the aggregate and working women as a group, are significantly advantaged by Social Security.

I believe that the sex neutrality and lack of disparate impact against women in Social Security should mean Social Security would not be affected by the proposed ERA. However, if ERA were ratified, it is almost certain that feminists who have been claiming discrimination, inequities against women, or disparate impact upon women in Social Security for over a decade would bring court cases demanding their reforms. The fact that these charges are erroneous will not prevent such lawsuits.

The point continually made by opponents of ERA in the 10-year debate has been that ERA is sufficiently vague and our courts sufficiently activist that no one can say for sure what the effect of ERA will be on this or many other laws. This is reason enough to oppose the passage of the proposed ERA.

The assertion that ERA would mandate fundamental changes in Social Security is repeatedly made by feminist organizations. NOW president Judy Goldsmith and the Congressional Women's Political Caucus have said that ERA would require the reexamination of the sexist assumptions that underlie the Social Security system and require its reform.

Professor Francine Blau has asserted that:

> ERA would grant Social Security benefits to the homemaker on the basis of her economic contribution to the family, rather than as an economic dependent.

The Civil Rights Commission has said that:

> Full-time homemakers have never been accorded any independent Social Security coverage.

And that:

> The ERA will provide a constitutional basis for urging the recognition of this contribution.

Marna Tucker has said that under the ERA, Social Security laws would require homemaker's work to be recognized as valid, wage-earner work, and columnist Sylvia Porter has asserted that the ERA when finally passed will require some changes such as treating a homemaker as an employee for Social Security purposes, including a homemaker tax on her husband as her employer.

The fact that women in the aggregate are significantly advantaged by Social Security would seem to adequately refute the allegations of systemic sex discrimination in Social Security. Feminist critics of Social Security are also wrong to assert that current law pays benefits to homemakers as economic dependents. The law has never designated spouse benefits as "dependents' benefits." The various types of spouse benefits are payable as a right on the basis of legal status and are not based on proof of dependency.

Their new-found concern for the plight of the homemaker under Social Security is either duplicitous or based on the mistaken notion that homemakers are victimized by Social Security. In fact the wife's benefit was added to Social Security in 1939 in recognition of the value of the contribution made by homemakers and a belief that women should have a guaranteed benefit whether they work inside or outside the home.

Advocating earnings sharing as a reform to help homemakers is ridiculous. Earnings sharing would mean the elimination of the wife's benefit, resulting in benefit cuts for families where one spouse is primarily a homemaker.

We can be certain that if the ERA were ratified and the Court accepted the feminist reformers indictment of Social Security as discriminatory or disadvantaging women, the "solutions" would be fundamental and expensive. Indeed, Social Security is so complicated that the unanticipated consequences and disadvantages of structural reforms are impossible to fully avoid. Since the disparate impact in Social Security is against men, women could be severely disadvantaged by reforms designed to correct "disparate impacts." Why put ourselves in the position of defending the constitutionality of Social Security against these charges or of allowing the Court to mandate changes in Social Security that Social Security experts agree cannot even be accomplished legislatively without creating more problems than would be solved?

The extensively debated and analyzed concept of earnings sharing is a case in point. Even our foremost expert on Social Security, Robert Myers, who says he supports the earnings sharing approach philosophically says:

> I know of no person, female or male, who has a thorough knowledge of the fiscal and administrative aspects of the OASDI system who believes that it is feasible to drastically revise the program in this manner. Either there will be persons with large benefit losses, as well as those with large gains, or else the cost of the program will be greatly increased if nobody is to lose out. In fact, under earnings sharing, many women will receive less than under present law.

I believe that it would take an unprecedented level of judicial activism for our courts to mandate changes in Social Security that feminists have not been able to accomplish legislatively, when no discrimination or disparate impact against women can be demonstrated: What feminist reformers of Social Security reform mean by disparate impact is not disparate impact by sex but rather a "disparate impact" on one group of beneficiaries vis-a-vis another group of beneficiaries, most particulary the two-income family versus the one-income family. Their primary concern is the relative rate of return to the taxes paid between these two types of families. Since each family obviously includes a man and a woman, this concern about the rate of return on taxes paid has nothing to do with sex discrimination, inequities against women, or a disparate impact on women.

Further, in a system of social insurance there is no reason to expect that the rate of return to different groups in different situations will be the same. Most authorities on Social Security agree with Stanford Ross that:

> . . . Social Security is a social welfare program of tax transfers to those who do not work because of retirement, disablement, or the death of a breadwinner . . . If Social Security is understood as a tax-transfer program, the rate of return question becomes irrelevant.

Social Security expert Robert Myers says:

> If individual equity were the overriding aim of Social Security there would be no need for a government program, because the private sector could just as readily handle it.

It could even be said that a "disparate impact" among groups is a characteristic of all Government programs that redistribute income. Surely our courts would not use the ERA to declare that there can be no such "disparate impact" among groups of beneficiaries in Social Security, or would they?

The distribution of benefits within social programs is properly a legislative question. Likewise, the reforms sought by feminist critics of Social Security are essentially political. They seek to change the present distribution of benefits to produce more for the subject of women they represent, and they are using the rhetoric of discrimination, inequities against women and disparate impact upon women in order to accomplish these changes. The most popular of these proposals, earnings sharing, has gone nowhere politically. Earnings sharing with a "hold harmless" provision would be extremely expensive, substantially increasing Social Security costs at a time when there is no surplus and no desire to raise taxes further. Earnings sharing without such a "hold harmless" provision, would increase the benefits for two-income families by cutting the benefits for one-income families. Efforts to achieve such a redistribution of income have so far shown little chance of passage by Congress both because common sense and research findings tell us that society is better off because many families decide to forgo a second income in order to have one parent, usually the mother, stay at home to care for their children.

Social Security as presently constituted allows women the freedom to choose different roles. By perpetuating the option to choose homemaking as a primary role, it stands in the way of the revolutionary notion of equality which says that men and women are not equal until the traditional division of labor within the family is abolished. It is currently a matter of considerable debate how much we should support the traditional family where one spouse chooses homemaking as a primary role.

This is, I submit, very much a political decision about the kind of society we want to encourage. So long as our public policy has a decent respect for the rights of individuals, there are important political choices to be made within the limits of the Constitution in its present form. I believe that this would probably not be changed by ERA. At the same time proponents of such fundamental changes in Social Security as earnings sharing will surely attempt to use ERA to achieve their political ends in the courts. I believe it is far better to resolve such issues in the legislative branch of Government, but it is conceivable that the courts might use ERA to restrict these political choices. Insofar as this is possible, ERA should be rejected.

Thank you, Mr. Chairman.

[The follow was received for the record:]

Statement by Judith Finn

Hearing on The Equal Rights Amendment and Social Security

Committee on the Judiciary, U.S. Senate

March 20, 1984

My name is Judith Finn. I am a homemaker from Oak Ridge, Tennessee. I was trained as an economist and political scientist and I worked for several years doing public policy research and teaching political science before I became a mother seven years ago. I have written a book entitled The Treatment of Women Under Social Security,[1] and am Chairman of the Task Force on Social Security for Eagle Forum, a national organization of women with traditional moral and family values, most of whom are homemakers.

Sex Discrimination in Social Security

The charge that Social Security discriminates against women is frequently made. This is contrary to the long-acknowledged fact that Social Security has been made sex neutral through various congressional amendments to the Social Security Act and by several Supreme Court decisions.[2] Informed opinion is nearly unanimous in recognizing these facts.[3]

Many of the changes in Social Security that have been made in response to the quest for sex neutrality have benefited men, not women. For example, until 1972, women could drop three more years than men from the averaging period for figuring retirement benefits. This provision had been designed to compensate women for their more intermittent pattern of labor force participation. In order to ensure the sex neutrality of Social Security, the number of years that both men and women could drop was set at five. Women in the aggregate thus became worse off as a result of this change.

For better or worse women are now treated the same as men under Social Security law. Women who choose to have a career or who must work for a considerable part of their lives have the same Social Security protection that comparable men have, and their benefits are calculated in exactly the same manner regardless of their sex. Both men and women in the labor force have disability insurance and

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survivor benefit protection, and both men and women are eligible for the "wife's benefit."

The frequent and exaggerated charges of discrimination and inequities against women have elevated the problems that certain groups, made up primarily of women, have under Social Security above countless other concerns of equal importance. These are not matters of sex discrimination in the present system, and the answers cannot be found in further sex neutrality. The fact is that many of the problems experienced by women under Social Security arise because women are treated the same as men, at the same time that their labor force participation pattern is substantially different from men.

Women Receive Greater Return than Men from Taxes Paid

Many feminists have now conceded the obvious--that Social Security is sex neutral. They now argue that Social Security has a disparate impact or effect on women. For example, at the House Judiciary Hearing on ERA, Ann Freedman argued that "Because of the disparate effect of the Social Security Act on women, and their association with sex discriminatory attitudes and practices, the ERA will require Congress to review these provisions and substitute others that treat women more fairly."[4] Tish Sommers testified that Social Security was an example of how a sex neutral law can have a disparate impact on women. She complains about the "presumption of women's dependency" and that women receive lower average benefits than men. She says, "The most important shortcoming is lack of recognition of the economic contribution to the family of the homemaker."[5]

In order to evalulate the charge that Social Security has a disparate impact on women it is necessary to measure how Social Security affects women in the aggregate. One way is to determine whether women as a group get as favorable a return for the taxes they pay into Social Security as men do. When measured this way, women get an even higher return from Social Security taxes than men, because women tend to live longer and retire earlier than men and therefore collect benefits longer. Because their average earnings are lower, women also receive a greater advantage from the weighted-benefit

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formula which is designed to favor persons with low earnings records regardless of whether this is due to a low wage rate or to a part-time or intermittent work record. These two factors outweigh the fact that more secondary benefits are paid on the basis of men's earnings records than on women's. If we compare the total taxes paid to the total benefits received by all women beneficiaries, either on the basis of their own or their husbands' earnings, women pay about 28 percent of the taxes and receive about 54 percent of the benefits.[6] Over the next 75 years, women will pay 33 percent of the taxes and receive about 50 percent of the benefits.[7] When measured in terms of the return from Social Security taxes, it simply cannot be argued that women in the aggregate are disadvantaged by Social Security or that there is a disparate impact on women.

Some women receive benefits from Social Security without paying any Social Security taxes. Congresswoman Schroeder has asserted that this is the only reason women receive higher total benefits than men.[8] However, when we restrict the comparison to women working in covered employment, we still find no evidence that women are shortchanged under Social Security. If we compare the taxes paid by working women to the benefits based on their earnings and received by all types of beneficiaries, we find that the cost of paying benefits to women workers and their dependents is higher than the cost of paying benefits to men workers and their dependents. Indeed, if separate systems were established, women workers would have to pay Social Security taxes that are about 9 percent higher than men would have to pay.[9] Since women pay the same Social Security tax rate as men, this means that women in the labor force get a higher return for their taxes than men do. Therefore, it cannot be said that the present Social Security system is unfair to women workers as compared to men workers, or that there is a disparate impact on women workers. Indeed women, both in the aggregate and working women as a group, are significantly advantaged by Social Security.

Social Security and ERA

I believe that the sex neutrality and lack of disparate impact

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against women in Social Security should mean Social Security would not be affected by the proposed ERA. However, if ERA were ratified, it is almost certain that feminists who have been claiming discrimination, inequities against women or disparate impact upon women in Social Security for over a decade would bring a court case demanding their reforms. The fact that these charges are erroneous will not prevent such law suits. The point continually made by opponents of ERA in the ten-year debate has been that ERA is sufficiently vague and our Courts sufficiently activist that no one can say for sure what the effect of ERA will be on this or many other laws. This is reason enough to oppose the passage of the proposed ERA.

The assertion that ERA would mandate fundamental changes in Social Security is repeatedly made by feminist organizations. NOW president Judy Goldsmith and the Congressional Women's Political Caucus have said that ERA would require the reexamination of the sexist assumptions that underlie the Social Security system and require its reform.[10]

Professor Francine Blau has asserted that "ERA would grant social security benefits to the homemaker on the basis of her economic contribution to the family, rather than as an economic dependent."[11] The Civil Rights Commission has said that "full-time homemakers have never been accorded any independent social security coverage" and that "the ERA will provide a constitutional basis for urging the recognition of this contribution."[12] Marna Tucker has said that under the ERA Social Security laws would require homemaker's work to be recognized as valid, wage-earner work,[13] and columnist Sylvia Porter has asserted that the ERA when finally passed will require some change such as treating a homemaker as an employee for Social Security purposes, including a homemaker tax on her husband as her employer.[14]

The fact that women in the aggregate are significantly

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advantaged by Social Security would seem to adequately refute the allegations of systemic sex discrimination in Social Security. Feminist critics of Social Security are also wrong to assert that current law pays benefits to homemakers as economic dependents. The law has never designated spouse benefits as "dependents benefits." The various types of spouse benefits are payable as a right on the basis of legal status and are not based on proof of dependency.[15] Their new-found concern for the plight of the homemaker under Social Security is either duplicious or based on the mistaken notion that homemakers are victimized by Social Security. In fact the wife's benefit was added to Social Security in 1939 in recognition of the value of the contribution made by homemakers and a belief that women should have a guaranteed benefit whether they work inside or outside the home.[16] Advocating earnings sharing as a reform to help homemakers is ridiculous. Earnings sharing would mean the elimination of the wife's benefit, resulting in benefit cuts for families where one spouse is primarily a homemaker. [add fn on homemakers not want disability in exchange and problem of divorced homemakers?]

We can be certain that if the ERA were ratified and the Court accepted the feminist reformers indictment of Social Security as discriminatory or disadvantaging women, the "solutions" would be fundamental and expensive. Indeed, Social Security is so complicated that the unanticipated consequences and disadvantages of structural reforms are impossible to fully avoid. Since the disparate impact in Social Security is against men, women could be severely disadvantaged by reforms designed to correct "disparate impacts." Why put ourselves in the position of defending the constitutionality of Social Security against these charges or of allowing the Court to mandate changes in Social Security that Social Security experts agree cannot even be accomplished legislatively without creating more problems than would be solved? The extensively debated and analyzed concept of earnings sharing is a case in point. Even our foremost expert on Social Security, Robert Myers, who says he supports the earnings sharing approach philosophically says, "I know of no person, female or male, who has a thorough knowledge of the fiscal and administrative aspects

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of the OASDI system who believes that it is feasible to drastically revise the program in this manner. Either there will be persons with large benefit losses, as well as those with large gains, or else the cost of the program will be greatly increased if nobody is to lose out. In fact, under earnings sharing, many women will receive less than under present law."[17]

I believe that it would take an unprecedented level of judicial activism for our courts to mandate changes in Social Security that feminists have not been able to accomplish legislatively, when no discrimination or disparate impact against women can be demonstrated. What feminist reformers of Social Security reform mean by disparate impact is not disparate impact by sex but rather a "disparate impact" on one group of beneficiaries vis-a-vis another group of beneficiaries, most particularly the two-income family versus the one-income family. Their primary concern is the relative rate of return to the taxes paid between these two types of families. Since each family obviously includes a man and a woman, this concern about the rate of return on taxes paid has nothing to do with sex discrimination, inequities against women, or a disparate impact on women.

Further, in a system of social insurance there is no reason to expect that the rate of return to different groups in different situations will be the same.[18] Most authorities on Social Security agree with Stanford Ross that "...social security is a social welfare program of tax transfers to those who do not work because of retirement, disablement, or the death of a breadwinner....If social security is understood as a tax-transfer program, the rate of return question becomes irrelevant." [19] Social Security expert Robert Myers says, "If individual equity were the overriding aim of social security there would be no need for a government program, because the private sector could just as readily handle it." [20] It could even be said that a "disparate impact" among groups is a characteristic of all government programs that redistribute income. Surely our courts would not use the ERA to declare that there can be no such "disparate impact" among groups of beneficiaries in Social Security, or would they?

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Social Security as presently contituted allows women the freemdom to choose different roles. By perpetuating the option to choose homemaking as a primary role, it thus stands in the way of the revolutionary notion of equality which says that men and women are not equal until the traditional division of labor within the family is abolished. It is currently a matter of considerable debate how much we should support the traditional family where one spouse chooses homemaking as a primary role.[22] This is, I submit, very much a political decision about the kind of society we want to encourage. So long as our public policy has a decent respect for the rights of individuals, there are important political choices to be made within the limits of the Constitution in its present form. I believe that this would probably not be changed by ERA. At the same time proponents of such fundamental changes in Social Security as earnings sharing will surely attempt to use ERA to achieve their

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political ends in the courts. I believe it is far better to resolve such issues in the legislative branch of government, but it is conceivable that the Courts might use ERA to restrict these political choices. Insofar as this is possible, ERA should be rejected.

Footnotes

1. Finn, Judith, *The Treatment of Women Under Social Security,* The Free Congress Research and Education Foundation, Washington, D.C. 1981.

2. *Ibid.,* pp. 19-21; Peter W. Martin, "Social Security Benefits for Spouses," *Cornell Law Review,* 63:5, June 1978, pp. 789-840; David Douglas, "Social Security, Sex Discrimination, and Equal Protection," *Baylor Law Review,* 30:1, Winter 1978, pp. 199-205; U.S. Department of Health, Education, and Welfare, *Social Security and the Changing Roles of Men and Women,* February 1979, p. 143; 1979 Advisory Council of Social Security, *Social Security Financing and Benefits,* December 1979, pp.91-92; Final Report of the National Commission on Social Security, *Social Security in America's Future,* March 1981, pp. 226-228.

3. Robert Ball, Testimony at Hearing before the U.S. Congress Joint Economic Committee, "The Treatment of Women Under Social Security," *Economic Problems of Women,* 93rd Congress, 1st sess., U.S. Government Printing Office: Washington, D.C., 1973, pp. 307-338; Task Force on Women and Social Security, *Women and Social Security: Adapting to a New Era,* a working paper prepared for the Special Committee on Aging, U.S. Senate, U.S. Government Printing Office: Washington, D.C., October 1975, pp. 16-17; Carolyn Shaw Bell, Testimony at Hearing before the U.S. Congress Joint Economic Committee, *op.cit.,* p. 299; Martha Derthick, "How Easy Votes on Social Security Came to an End," *The Public Interest,* No. 54, Winter 1979, p. 262; Robert Myers, Testimony before the Task Force on Women and Social Security, U.S. House of Representatives Select Committee on Aging, September 22, 1983.

4. Freedman, Ann, Testimony at a Hearing on the Proposed ERA before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, U.S. House of Representatives, November 3, 1983, p. 12.

5. Sommers, Tish, Statement before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, September 14, 1983, p.3.

6. Ball, Robert, *Social Security and Women,* Testimony before the U.S. Congress, House of Representatives, Committee on Ways and Means, Subcommittee on Social Security, November 2, 1979, cited by Alicia H. Munnell and Laura E. Stiglin, "Women and a Two-Tier Social Security System," in Richard V. Burkhauser and Karen C. Holden (eds.), *A Challenge to Social Security,* Academic Press: New York, 1982, p. 106.

7. 1979 Advisory Council on Social Security, *op.cit.,* p. 92.

8. Hearing on the Proposed ERA before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, U.S. House of Representatives, October 20, 1983.

9. 1979 Advisory Council on Social Security, *op.cit.,* p.92.

10. Goldsmith, Judy, Testimony of the National Organization for Women, Hearings on the ERA before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, September 14, 1983, p. 6; Congressional Women's Political Caucus, "Analysis of the Meaning of the ERA," unpublished, November 1, 1983.

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11. Blau, Francine, Testimony at the Hearings on the Proposed ERA, op.cit., September 14, 1983, p. 9.

12. U.S. Civil Rights Commission, The Equal Rights Amendment: Guaranteeing Equal Rights for Women Under the Constitution, Washington, D.C., June 1981, p. 15.

13. Tucker, Marna, Testimony at the Hearings on the Proposed ERA before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. Senate, Washington, D.C., May 26, 1983, p. 135 (transcript).

14. Porter, Sylvia, Column, April 9, 1975.

15. Myers, Robert, "Incremental Change in Social Security Needed to Result in Equal and Fair Treatment of Men and Women," in Richard Burkhauser and Karen Holden, A Challenge to Social Security, op.cit., p. 240

16. Altmeyer, A.J., The Formative Years of Social Security , Madison, Wisconsin: University of Wisconsin, 1968, pp.101-102; Brown, J. Douglas, An American Philosophy of Social Security: Evaluation and Issues , Princeton, New Jersey: Princeton University Press, 1972. pp. 135-142.

17. Myers, Robert, Testimony before the Task Force on Women and Social Security, op.cit., September 22, 1983, p. 139.

18. Ibid ., and Judith Finn, The Treatment of Women Under Social Security, op.cit., pp. 24-28.

19. Ross, Stanford, "The Changing Nature of Social Security," in Richard Burkhauser and Karen Holden, op.cit., pp.249-250.

20. Myers, Robert, "Incremental Change in Social Security Needed to Result in Equal and Fair Treatment of Men and Women," op.cit., p. 238.

21. Moore, Raymond and Dorothy, et.al, School Can Wait , Provo, Utah: Brigham Young University Press, 1979; Fraiberg, Selma, Every Child's Birthright: In Defense of Mothering , New York: Basic Books, 1977; Hill, Russell and Frank Stafford, Parental Care of Children: Time Diary Estimates of Quantity Predictability and Variety , Ann Arbor, Michigan: Institute for Social Research, Survey Research Center, University of Michigan, (ISR #8004), November 1978, (published in the Journal of Human Resources, 1980): Fleisher. Belton, "Mother's Home Time and the Production of Child Quality," Demograph., May 1977, pp. 197-212, and Milne, Ann M., Single Parents, Working Mothers, and the Educational Achievement of Elementary School Age Children , and Myers, David E., et.al., Single Parents, Working Mothers, and the Educational Achievement of Secondary School Age Children , (draft), Reports prepared under Contract #300-80-0778 with the U.S. Department of Education, Washington, D.C., 1983.

22. Carlson, Allan C., Testimony presented at a Hearing on" The Causes and Societal Consequences of Family Breakdown" before the Subcommittee on Family and Human Resources, Committee on Labor and Human Resources, U.S. Senate, Washington, D.C., September 22, 1983.

Senator HATCH. Thank you both.

I would now like to ask a series of questions about the impact of the equal rights amendment upon the Social Security Program in an effort to establish a useful legislative history in this regard. So I will respectfully ask the panelists if you will be as direct and as succinct as possible in responding to questions.

I would also like to emphasize once more that the subject of this morning's hearing is not the wisdom or the prudence of various reforms to the Social Security System, but what precisely would be required in the way of change should the ERA become part of the Constitution. That is really what we want to know.

I am sure there is much room for reform and we can all debate that at another time, but I want to know what will be the impact or the effect of the equal rights amendment should it become part of the Constitution?

I would just like to get one matter clarified at the outset. Is the Social Security law today fully sex neutral? In other words, is the female worker treated identically to the male worker insofar as the eligibility for and the level of Social Security benefits?

Ms. Sherburne.

Ms. SHERBURNE. Mr. Chairman, the Social Security System today is facially sex neutral. There are no facial gender-based distinctions, with a minor exception that I understand is being corrected at this time. The 1983 Social Security amendments rectified any remaining facial gender-based distinctions in the law.

Senator HATCH. Do you see any other aspect other than this one exception in which the law is not sex neutral?

Ms. SHERBURNE. Facially sex neutral, no. There is no other way.

Senator HATCH. Mrs. Finn, do you agree or disagree with that?

Mrs. FINN. No, I think it is sex neutral.

Senator HATCH. OK. Given that the Social Security System is truly sex neutral, why does the congressional women's caucus contend that the Social Security System is "based upon sexist assumptions?"

Ms. SHERBURNE. Mr. Chairman, I am not familiar with their precise position, so I am not sure what their reasoning is. The Social Security System as I see it, is based on stereotypic notions of the way women live in our society and how that role is valued. It does not attribute any economic value to the work that a woman performs in the home and it is ill suited to any worker that spends a large portion of his or her life out of the paid work force and a large portion in the paid work force. It disadvantages those kinds of people. Those kinds of people are predominantly, in our society, women.

Senator HATCH. In other words, the critique of the Social Security System by some women's groups rests not upon any remaining facial bias in the system but upon the fact that it has a "discriminatory impact" upon women. Am I more correct in saying that?

Ms. SHERBURNE. Yes, sir.

Senator HATCH. Mrs. Finn, do you have any comments about that?

Mrs. FINN. Well, first, I do not think there is a discriminatory impact in Social Security against women in the aggregate. I do not think the ERA would impact on subgroups of women and declare that different groups of women cannot come out differently under Social Security. No one arguing that ERA will change Social Security has been able to show that women in the aggregate are discriminated against or that there is a disparate impact against women.

Senator HATCH. Ms. Sherburne how would you respond to Mrs. Finn's statement that the Social Security System is neither designed to discriminate against women nor does it yield any disparate impact upon women. Is that a correct interpretation?

Ms. SHERBURNE. I do not think that that analysis is appropriate, Mr. Chairman.

As Mrs. Finn notes, Social Security is not a program that is designed to provide equitable returns on taxes paid. She herself stated, and I would agree with her, that Social Security is primarily a tax transfer program. So I do not find that this analysis is appropriate.

If one undertakes that analysis, however, which for the purposes of argument I am willing to do, I still think that the wrong measure of value is being used. It is the wrong reference. Social Security taxes, if they are viewed as purchasing anything, should not be viewed as purchasing benefits but rather protection—protection against risks to economic security that we have for ourselves and our families. And as with any insurance purchase, if you do accept viewing the program as an insurance program, which I do not think is appropriate, but if you do want to look at it that way you see that your taxes, as in any insurance program, are premiums that are buying a particular package of benefit protections that you may or may not use. And so when you look at it in that way, it is men, and not women, who get a more favorable return on taxes paid because men, with their higher wages and their more continuous attachments to the work force, undoubtedly claim the lion's share of Social Security protection that is available to workers and their families.

Senator HATCH. Mrs. Finn, do you have any comment?

Mrs. FINN. Well, I am not sure I understand the point and I don't know any other way to evaluate whether there is a disparate impact against women in Social Security than to determine the rate of return to taxes paid by women in the aggregate. Women not only pay lower Social Security taxes but they get more protection and they get more benefits, specifically women pay 28 percent of the taxes and receive 54 percent of the benefits. How can it be disputed that women are not disadvantaged by Social Security? Men are the ones that are disadvantaged. They pay more of the taxes for a smaller share of the benefits.

Senator HATCH. Ms. Sherburne, am I correct in understanding what you are saying? Is it because the Social Security System yields a disparate impact upon some women as opposed to some other women, that it would be subject to strict scrutiny under the ERA; is that a correct interpretation?

Ms. SHERBURNE. I think, Mr. Chairman, that what we see with the Social Security Program is that it is ill suited to the lifestyles of families and homemakers and women workers in our society and that that produces a number of problems for women across the board.

Senator **Hatch**. But am I right in assuming you are talking about a disparate impact upon some women as distinguished from some other women?

Ms. **Sherburne**. I am talking about the entire program and how women gain access to benefits and that some women find that the program does not work for them because they do not have disability protection. They become disabled and they do not have any benefits. Some women find that the program does not work for them because they are divorced before 10 years of marriage and they spent that entire 10 years taking care of children in the home and they have no protection. Some women find that they spent a large portion of their lives working for pay at low wages and a portion of their lives working for no pay at all. And when it comes time to retire their benefits are very low.

So across the board, the program is ill suited to the way women are living.

Senator **Hatch**. Am I correct that you are arguing that under the ERA the Social Security Program should be subject to some degree of special scrutiny?

Ms. **Sherburne**. I would certainly hope that the ERA would reach beyond facial discrimination and take a look at a program such as Social Security that disadvantages women, yes.

Senator **Hatch**. In your article in the Georgetown Law Journal you state that:

> Only comprehensive restructuring of Social Security will achieve significant improvement in women's treatment under the program.

Then, you further observe that:

> Legislative reforms aimed at improving Social Security protection for women must therefore change the basic structure of the program rather than work at its margins.

Let me just ask you this straightforward question:

Would the equal rights amendment require what you describe as "significant improvements in women's treatment" under the Social Security Program?

Ms. **Sherburne**. I would certainly hope that the ERA would reach the kinds of disadvantages that women suffer under the Social Security Program.

Senator **Hatch**. You believe that it would?

Ms. **Sherburne**. I think that that depends on the kind of legislative history that you develop and I would certainly encourage you to develop such a legislative history, and if it were up to me to develop that legislative history, I would make certain that it clearly reflected that the equal rights amendment would reach that kind of discrimination that disadvantages women.

Mrs. **Finn**. May I make a comment?

Senator **Hatch**. Sure.

Mrs. **Finn**. Women are advantaged by Social Security. I do not think that ERA would impact on subgroups of women whose benefits differ because of the different roles which these women play. The ERA says that equality of rights shall not be abridged on account of sex.

Different groups of women are doing differently under Social Security, and I think the system is well suited to the different roles of women. If a woman is primarily a worker in the labor force, she will receive a worker's benefit, and if a woman is primarily a homemaker, she will receive a wife's benefit. I think this flexibility is well suited to the different roles which women choose to play, and I do not feel that these benefits are inadequate.

With respect to the question that we are addressing today, whether ERA would impact on Social Security, I do not see how it could be argued that ERA would impact on the different groups of women depending on the roles they play.

Senator **Hatch**. Well, in our opening day of hearings on the equal rights amendment last year those on this committee who are the leading proponents of the amendment selected as their principal spokesperson Ms. Marna Tucker and among the observations that Ms. Tucker made was that the ERA "would require homemakers' work to be recognized as valid wage-earner work" under the Social Security Program.

Do you agree or disagree with Ms. Tucker with regard to that statement?

Ms. **Sherburne**. I think there are a variety of ways that the equal rights amendment could be——

Senator **Hatch**. What about that way?

Ms. **Sherburne**. That particular statement? I think it is possible that a reform would embody that notion, but that it is also possible that a reform would embody a different notion.

Senator **Hatch**. But is it correct for Members of Congress to assume that ERA would require some reform along those lines?

Ms. **Sherburne**. I think that the equal rights amendment would require that assumptions about women's role in society be carefully scrutinized and that certainly when we have a major social program like Social Security that is designed to take care of people who find themselves at risk, that if it provides less well for women than for men, it has to be looked at.

If the reason you decide to look at it that way is because women's work in the home is given a value, I think that that is perfectly legitimate; that is certainly the way I would approach it. I think that women's work in the home does have value and should be recognized as something that is a terrible loss when it becomes unavailable.

Senator **Hatch**. So you agree with Ms. Tucker?

Ms. **Sherburne**. I would agree that women's work in the home has value and that that value ought to be recognized by the Social Secuity Program.

Senator **Hatch**. And the ERA would require that recognition.

Ms. **Sherburne**. I would hope that the legislative history would be clear that the equal rights amendment would require that recognition.

Senator **Hatch**. I am a little perplexed because as you know we are trying to determine how public policy in the area of Social Security will be affected by the equal rights amendment. Yet in your 15-page statement you devote only two paragraphs to this particular question, two paragraphs that provide almost no guidance to this committee or, I would imagine, to any Member of this body.

For instance, you state that the legislative history that we make should be clear with respect to Social Security. Yet here you are helping us this morning to make that very history. That is the purpose of having you here on Social Security. But thus far most of what you are saying is that you hope it will be this way but you are not sure.

Ms. SHERBURNE. The equal rights amendment would not mandate any particular reform. The equal rights amendment would mandate fairness and however the Congress decided to implement that mandate would be a political judgment. There are many different ways one could approach that reform.

Senator HATCH. Well, then, Congress could do whatever it wants or whatever it thinks is fair.

Ms. SHERBURNE. As long as the result met a mandate of fairness.

Senator HATCH. Well, who is going to determine that mandate of fairness? Will Congress determine what is fair and what is not fair with regard to Social Security issues as impacted by the equal rights amendment or are the courts going to decide?

Ms. SHERBURNE. The Congress will be designing and evaluating programs with the equal rights amendment as a tool to take that kind of a look and certainly that will be the guiding principle for any kind of reform. But the task of creating that reform is certainly with the Congress.

Senator HATCH. But what does that mean? If the equal rights amendment passes, just what kind of reform will be required or what kind of fairness will be mandated?

There are a lot of differences in our society about what is fair and what is not fair. Some people think that to be fair the Federal Government must do everything that needs to be done for persons who have any particular problem in our society. Others feel that it would be unfair to the taxpayers to pursue that type of a government. So who is going to determine these issues? Is it going to be the Congress or will it be the courts?

Ms. SHERBURNE. I think that the Congress—as a political body—has the responsibility and the obligation.

Senator HATCH. No question about that. The question is who is going to determine what fairness is.

Ms. SHERBURNE. I think in this regard I would agree with you that that determination is a complex question. I think we are fortunate in the area of Social Security to have such a jump start on this question. With or without the equal rights amendment reform is under way. The process of determining what is fair and how the people of this country perceive fairness is under way. Whatever reform is crafted as a result of that process would certainly be looked at carefully by the court. But the crafting of that reform would be guided by the basic principles of the equal rights amendment.

Senator HATCH. How will those principles guide it? Congress has every bit the obligation to be fair now under the present law. How will the equal rights amendment change that obligation? What will be the impact of the equal rights amendment on the obligation to be fair?

Ms. SHERBURNE. Well, I think that the fact, Mr. Chairman, that the Congress has already started taking a look at Social Security and its unfairness——

Senator HATCH. That is without the ERA?

Ms. **Sherburne**. That is without the ERA, and I think the Congress is to be commended in this area to not need that extra push to undertake this effort. I think the ERA would provide a further push in this area. Many Members of the Congress and people in different areas of our country have looked at this and have come to the conclusion that the system is unfair and it needs to be changed and that process of reform is being undertaken.

Senator **Hatch**. Will the ERA force that change? And if so, how will it do it?

Ms. **Sherburne**. I think the ERA will require that the unfairness in the system be redressed.

Senator **Hatch**. The unfairness that you have been addressing?

Ms. **Sherburne**. That is right.

Senator **Hatch**. Mrs. Finn, what is your point of view on those questions? It is very interesting.

Mrs. **Finn**. I think this argument about fairness illustrates that ERA is just a symbolic statement. I have been unable to find, and I do not hear it from Ms. Sherburne this morning, any detailed analysis of how ERA would impact on Social Security or how ERA would force Congress to do anything that they are not doing now. I think because these feminist critics of Social Security cannot show discrimination, and have brought forth no evidence that there is a disparate impact against women makes this not a constitutional question, not a question of sex discrimination which would be impacted by the proposed constitutional amendment. The choices here are essentially political, and properly belong in the Congress not the courts.

There are legislative questions about Social Security to be decided by this body with their differing understandings of fairness. But I do not think there are constitutional issues here.

Senator **Hatch**. Let me ask you both this question:

Would the ERA require some form of Social Security credit for the estimated economic contribution of homemaker services?

Mrs. **Finn**. I think not, because homemakers are not disadvantaged by Social Security. However, this surely will be sought by critics of Social Security.

Ms. **Sherburne**. The equal rights amendment would not require any particular kind of reform. The reform should acknowledge that there is a value to women's work performed in the home. From the work that I have done in this area, I think the homemaker credit notion is very difficult kind of reform to construct. That is my personal view.

The ERA might provoke a more intense look at homemaker credits but the ERA would not require that particular——

Senator **Hatch**. Would you be kind enough to share with us some of the reforms that you think the ERA would require?

Ms. **Sherburne**. I do not think ERA will require a particular reform. The ERA would require that the system be redesigned so that it treats women fairly. There are a number of different reforms that could do this. A homemaker credit is one idea that has been advanced that would deal with a certain aspect of the system. The reform that I spent most of my time taking a look at, which again would not be required by the equal rights amendment, but I would suggest would be a good place to start, is an earnings sharing reform. That reform would recognize that a woman's work in the home does have value and that the loss of it needs to be covered by Social Security.

Senator HATCH. Is there any other kind of reform other than earnings sharing that you feel the equal rights amendment would mandate?

Ms. SHERBURNE. I do not think the equal rights amendment will mandate earnings sharing or will mandate any other particular kind of reform. There are a host of reforms that people have looked at and been studying. They have been reviewed in places like the 1979 Advisory Council Report and a report that the Department of HEW did in 1979 on the changing roles of men and women. These are all places where the Congress would have a fertile area to look around for ways in which those political choices could be made. As long as the bottom line would be fairness, no particular reform is mandated by the equal rights amendment.

Senator HATCH. Then you would disagree with some of those, both inside and outside of Congress, who have argued that the ERA would require some kind of reform involving independent coverage of the homemaker. The Civil Rights Commission, for example, has observed that the ERA "will provide a constitutional basis for urging recognition of this contribution."

Do you disagree with that?

Ms. SHERBURNE. I believe that one of the core principles of the equal rights amendment is that the work that the woman performs in the home has value and has an economic value. And if that core principle is adequately reflected in the legislative history that is developed, I think that any reform of Social Security would then have to recognize the economic value of that contribution.

Senator HATCH. I see.

You state that no "particular" reform would be required. Now, is there any other kind of reform that would fully satisfy ERA standards other than extending coverage to homemakers? What might some of these reforms be?

Ms. SHERBURNE. Some of the other reforms that have been looked at have been ways to adjust the system's ability to deal with years that a woman has worked inside the home, such as a credit for child care—that sort of thing. Again, these kinds of changes would have to be looked at very carefully to make sure that they did promote systemwide fairness. I do think that at this point an earnings sharing idea is probably the most comprehensive reform that has been looked at. There have been some other——

Senator HATCH. There are a lot of differences about whether it is even "fair". There are arguments on both sides of that.

Ms. SHERBURNE. There are an infinite number of ways that an earnings sharing reform could be devised and implemented. There are tradeoffs that have to be made. You could implement it with enormous costs. You could implement it with cost savings. There are a lot of different features that it could contain. So there is not really one particular earnings sharing reform that is on the table. That is what all this study is doing. looking at various reform options under the earnings sharing rubric and trying to determine what the impact would be and what the cost would be.

Mrs. **Finn**. I think it would be fair to say that if you had an earnings sharing proposal it would either be extremely expensive, that is, if there were a hold harmless clause or it would redistribute benefits from one group of women to another group of women. We are not talking about from men to women.

Senator **Hatch**. You are saying there is another fairness issue?

Mrs. **Finn**. Right. There are all kinds of fairness issues. Most of the experts on Social Security think that you would create many more inequities or comparisons which seem unfair and inequitable to certain groups within our society by implementing earning sharing than you would solve.

Senator **Hatch**. Who is going to settle these competing fairness issues; Members of Congress or the courts?

Mrs. **Finn**. You are right, this is the issue. I think these are essentially legislative questions. We are not talking about disparate impact against women or discrimination against women. Rather we are talking about redistributing benefits between different families both containing women but women who are playing different roles and receive Social Security benefits on different bases.

Senator **Hatch**. Senator DeConcini—I do not mean to monopolize the time, why do we not turn to you for a while.

Senator **DeConcini**. Mr. Chairman, thank you very much. I appreciate the opportunity. And I thank you, Mr. Chairman, for your continued interest in taking the time to go through this.

I have a statement of introduction and I ask that it appear in the record at the beginning of the hearing this morning.

Senator **Hatch**. Without objection we will place it in the record.

Senator **DeConcini**. I do have a couple of questions.

Ms. Sherburne, would you comment please on Mrs. Finn's statement. If I read it correctly she has said that Social Security does not discriminate because if a woman chooses to be in the work force she is covered as a worker; and if she chooses to stay home, she is covered by the wife's benefit. I think that is correct, Mrs. Finn; is that correct?

Is it not true that the majority of women today fit into neither of these categories? Is that not really the problem with Social Security today, that women are in the work force for several years and then they drop out and they go to homemaking or to raising their family and then later some of them come back into the work force? And I am under the impression that the majority of women are not in the system long enough. I do not know if that is true.

Can you comment on her statement?

Ms. **Sherburne**. Well Senator, I think you hit the problem right on the head. The system is ill-suited to the way women live. They do have a dependent spouse benefit if they stay home, which does not give them survivor and disability protection for themselves, and which they only get if and when their husband retires. And if they work for pay, they gain insured status and benefits in their own right, but those benefits are going to be low because benefits are computed on the basis of lifetime wages and their wages when averaged over a lifetime, will be low.

The other problem that women have when they move between these roles, as most women do, is these recent work requirements for disability and survivor benefits. If a woman was once insured under the Social Security program for disability and survivor protection and then she leaves the work force for a period of years, say 7 years, she has lost the protection that she once acquired and, if she became disabled or if she died her family would not get benefits. She has to reenter the work force and work to regain that recent work status.

Senator **Hatch**. How does ERA help?

Senator **DeConcini**. Yes, I just want to pursue that. I will be glad to yield.

Senator **Hatch**. Why would the equal rights amendment passage help that problem?

Senator **DeConcini**. That is my question also.

Ms. **Sherburne**. Because he has said it more often.

Senator **Hatch**. Yes.

I am concerned about the impact of the ERA. If all it does is say the Congress has to continue to be fair, then it does not do very much.

Senator **DeConcini**. Well, if the chairman would yield.

Let us assume that is all it says, is that the Congress should be fair——

Senator **Hatch**. But we have that obligation now.

Senator **DeConcini**. Yes, but isn't that obligation stronger Mr. Chairman, if it is in the Constitution?

It seems to me the ERA would only require us to equalize the Social Security System. I am not the witness today, but that is my opinion.

Senator **Hatch**. Well, the Senator believes that if we do not amend the Constitution, the status quo remains. If we do amend it, it has got to add something. Under the redundancy theory, we do not amend it just to say that the Congress has to be fair.

Frankly, I think we already have the obligation to be fair and the constitutional amendment is not going to change that obligation. But the question is: What will happen if the equal rights amendment is passed? If nothing will change, then maybe we do not need the equal rights amendment. If it will correct all of these problems that some claim exist, or force one set of policy changes, then we ought to at least be told what kind of Social Security System will be mandated. And if that mandating becomes the prerogative of the judges and the courts in this country, then that even bothers me more. But if it is Congress' job to resolve these problems, then we should be working within the legislative authority of the Congress to resolve these problems now, and we do not need the equal rights amendment to do that?

Senator **DeConcini**. In response, Mr. Chairman, I think the answer is clearly that you do need something because Congress has not corrected these particular things that Ms. Sherburne has pointed out and Mrs. Finn also said about the inequities. If the Congress was doing its job and treating the sexes equally under the Social Security System, maybe we would not even be having this hearing; would you agree?

Ms. **Sherburne**. I think that is absolutely right, Senator.

Mrs. **Finn**. I think that the sexes are being treated equally under Social Security. Similarly situated men and women are treated exactly the same. It seems to me that the proponents of reform are playing it both ways, they on the one hand suggest that women are treated as dependents when they are really independent and should be treated like all other workers.

On the other hand, they are saying women are treated like all other workers instead of receiving special treatment because the secondary earner in a family is almost always the woman and women have lower salaries and continue to contribute only, around 25 percent to total family income in two-income families. It seems to me that it makes the most sense to do what the current Social Security System does, that is, to entitle women in different ways, depending on which role they play. I think the Social Security System does recognize that there should be a guaranteed minimum benefit to a wife whether she works inside or outside the home. And this is what the wife's benefit was added to the Social Security in 1939 to do, and it still performs that function.

This does not mean that women are treated differently from men if they have jobs in the labor force and earn benefits in their own right. They can only increase their benefits by going to work. But the wife's benefit defines a minimum benefit for all secondary earners.

Senator DECONCINI. Would you agree, Mrs. Finn, if there is a disparity here perhaps there should be credit given to the homemaker role and maybe that is one alternative.

Mrs. FINN. I think there is credit given to the homemaker role. The wife's benefit is the credit given.

Senator DECONCINI. I agree with you, but maybe the debate ought to be our whether that should be increased.

Mrs. FINN. Well, I guess we could debate that but I do not think it is the subject——

Senator HATCH. We do not need the equal rights amendment to do that.

Senator DECONCINI. To me it seems it is quite the contrary. If Congress agrees with my theory that we should increase those benefits to make them fair, because the raising of the family and the homemaker is just as important as being on the sideline or a lawyer downtown and I think probably you would agree that the profession of raising a family is indeed so essential to our society, why shouldn't a person be able to receive all the benefits, whether he or she goes to work or stays home?

Mrs. FINN. The reforms sought by feminist critics of Social Security would eliminate the wife's benefit and cut the retirement benefits for her one-income family.

Senator DECONCINI. And I appreciate your point of view that the System now is set up where women have been considered, indeed they have.

It just seems to me that it is unfair that they do not receive equal benefits.

Mrs. FINN. On the one hand people say the wife's benefit is too high—50 percent of the husband's primary benefit—and on the other hand, they say it is not enough.

Senator DECONCINI. I agree with you, Mrs. Finn. You would have to address the financing of it, no question about it.

Senator HATCH. Would the Senator yield on that point?

Senator DECONCINI. I will be glad to yield.

Senator HATCH. It seems to me that if you are talking about fairness and you want to adopt that, then you would be transferring income from single-family earners to double-family earners.

What is necessarily fair about that?

Mrs. FINN. I do not think it is fair.

Senator HATCH. You would be taking from those who are less able to support themselves and redistributing their moneys upwardly to double-family workers who are generally more able.

Mrs. FINN. Right. Two earner couples are on the average earning about 33 percent more than one earner couples.

Senator HATCH. So what is necessarily fair about that?

Senator DECONCINI. If the Senator will yield, I will answer what might be fair about that.

If you are committed to encouraging family development and are committed to the role of the mother in the family who cannot or does not feel that she should, and the husband probably agrees, work at that time outside the home, you are certainly in my judgment doing something that is very beneficial. And whether you take it from single people or you raise the funds some place else, you are doing, in my opinion, a very necessary thing to encourage exactly what you and I believe so much in and discussed at such great lengths—stopping the deterioration of families.

Mrs. FINN. I agree with what you are saying. However, the advocates of earning sharing, are knowingly seeking the elimination of the wife's benefit. This means that women could only obtain the same level of Social Security benefits by entering the labor force. I think it would greatly increase the probability that women would have to enter the labor force in order to have the same security in retirement that they now have via the wife's benefit. Otherwise the one income family could be left with one benefit, credited half to the wife and half to the husband, but just one benefit, instead of one and one half benefits as under present law where the homemaker gets the wife's benefit equal to 50 percent of her husband's primary benefit.

Senator HATCH. So the family would not benefit as much.

Mrs. FINN. I do not think the traditional, one-income family would benefit at all. The reformers want to encourage two-income families where both spouses work outside the home.

Senator DECONCINI. Well, if they had to go to work, I would agree with you.

Mrs. FINN. If you value the contribution of the homemaker, you would not want to remove the wife's benefit from Social Security. I have used the term "wife's benefit," but I should point out that this is completely sex neutral, and house husbands are equally eligible. But if you want women to be allowed the option of being full-time homemakers, you would not support earning sharing, the essence of which is the elimination of the wife's benefit. It would not help the one-income family because it would redistribute income from the one-income family where there is a breadwinner and a homemaker to the two-income family. I think this makes no sense.

Senator DECONCINI. Ms. Sherburne, would you expound a little bit more on the earning sharing and the impact to the family?

Ms. SHERBURNE. Absolutely.

Senator **DeConcini**. I believe you touched on it a little bit. But would you comment?

Ms. **Sherburne**. The earning sharing reform is based on the notion that marriage is an economic partnership and that work in the home has value. The major impetus for this reform came from homemakers. Earning sharing would not eliminate homemaker benefits. Rather, it would replace homemaker benefits with a route of access to benefits that a woman would have in her own right, based on her own contribution to the marriage. Under earnings sharing, spouses would pool earnings during the years of marriage; each spouse would be credited with half of the total amount of earnings for Social Security purposes. This would mean that a homemaker who is out of the paid labor force for 7 years of the marriage would be credited with half of the wages of her husband on her own Social Security record. This not only would give her access to the retirement benefits which she would have as a dependent spouse under current law, but it would also build her protection for survivor benefits and disability protection for herself and her family. The current spouse benefit, while provided for spouses who are staying home, does not recognize the contribution that those women make because it does not provide any opportunity for disability and survivor protection.

If the woman were to die, where is the recognition from the Social Security Program that her contribution is missed? There is nothing. There is no ability for that family to get survivor benefits if she dies. If she becomes disabled, where is the recognition that the Social Security Program gives to her status as a valued and contributing member to the family? There is nothing. It provides no benefit for the family if she becomes disabled

Earning sharing is one way to recognize that contribution. By pooling earnings with the spouse, both spouses share the benefits and the burdens of a choice that the family makes to have one spouse stay home and one spouse work for pay.

Senator **DeConcini**. To followup on this hypothetical situation, if after 7 years the woman elects to go to work wouldn't income that she earns outside the home be added to the husband's funds and then divided accordingly?

Ms. **Sherburne**. That is correct.

Senator **DeConcini**. As a partnership, even though one might make more than the other regardless of who it is.

Ms. **Sherburne**. That is correct.

So the penalty that she may have suffered for having stayed out of the paid work force, low-entry level wages, will then be again shared by both spouses. She is not going to be unduly penalized by their choice to have one person operate in the family as an unpaid worker.

Mrs. **Finn**. Married women who are primarily homemakers do not need earnings credits in their own name if they have an intact marriage at the time they retire. It is a farce to create a fictitious earnings record and attribute each spouse half the earnings. But the economic consequence of earnings sharing is that one-income families will have their benefits cut from 1½ benefits back to one benefit and it would be shared equally between the husband and wife. Because their benefits would be cut back to one benefit, this would be a one-third cut in benefits except to the extent that it is made up by the weighted benefit formula.

Disability and survivor benefits for homemakers, it is true are not provided by Social Security. However, I do not think that homemakers are going to be better off under earnings sharing because they would split the total disability insurance and survivor insurance with their husbands each being credited with one-half. In a situation where all the income for the one-income family was lost, such as, if the husband were to become disabled, the benefits for that family would only be half of what they are under present law.

It is true that the other half would rest with the woman who does not have any lost earnings to replace, but I do not think that one-income families are going to be better under such a reform.

Senator DECONCINI. But the reason she does not have any earnings is because we do not, as a Government and as a Social Security System recognize that as of a financial value.

Mrs. FINN. We recognize it as a financial value but we do not give it a wage.

Senator DECONCINI. Yes. We do not tie some monetary——

Mrs. FINN. Right. But I do not see it as an injustice or a violation of constitutional rights either that under Social Security homemakers are not given fictitious earnings record or covered by a disability or survivor's insurance. Whether to add such provisions to Social Security would surely not be impacted by ERA. But homemakers do not think it is an inequity and are not demanding such liberalization of the program raising the Social Security taxes further. The lack of disability and survivors insurance for homemakers does not suggest that homemakers are not valued by society. Social Security is a social insurance program to replace lost earnings.

Senator DECONCINI. Yes.

Mrs. FINN. And I do not think that is an inequity against women not to make them employees of the Government or their husbands and put a wage value on their work and then a homemakers' tax on their earnings. Homemakers from all over this country testified against the homemaker tax and earnings sharing in the regional hearings on these issues held by the National Commission on Social Security in 1979–80.

Senator DECONCINI. Mrs. Finn, I have great respect for your statement and your background.

You set out in your statement a number of facts that seem to indicate that women in the aggregate are significantly advantaged by the present Social Security System. I do not see it that way, but your testimony is very well put.

I would like to ask Ms. Sherburne how she disagrees with that? I have my own reasons but I would like Mrs. Sherburne to share hers with us.

Ms. SHERBURNE. Well, as I indicated earlier, I first think that it is an inappropriate way to analyze the Social Security Program. As Mrs. Finn's testimony notes that Social Security is a tax transfer program, so analyzing rate of return, as she says, is irrelevant. To discuss the effect of the program on women versus men in terms of taxes paid and benefits received I think is an inappropriate analysis. If one insists on pursing that analysis, the wrong measure of value is being used. You should not be measuring the aggregate benefits received, but rather what kind of protection you are purchasing with your tax payments.

Again, I do not think this is an appropriate analysis at all, but if it must be pursued, at least acknowledge that the protection purchased is protection against the economic risk if either spouse dies, becomes disabled or retires. And men, with their more continuous attachment to the work force, and their subsequent greater access to Social Security protections, do claim undoubtedly the lion's share of the protection.

Further, this kind of a measure does not recognize the economic value of a woman's contribution in the home. So even though she is paying 28 percent of the taxes that analysis fails to account for the in-kind contribution that she is making to the unit in the home.

Senator DECONCINI. That analysis does not take into account what supposedly is a true partnership.

Ms. SHERBURNE. That is correct, Senator.

DECONCINI. Well, Mr. Chairman, thank you. That is helpful to me, both Mrs. Finn and Ms. Sherburne's difference of views here. I cannot say that the equal rights amendment would damage this by any means and I think it is going to be clear, distinct indisputable message that Congress to get it in gear. And if they do not, if the equal rights amendment were in force, the courts would tell us to do it.

Mrs. FINN. That is the question, but what would the courts tell you to do?

Senator DECONCINI. Well, I think the point is most people in this body attempt to follow the Constitution and it seems to me that if the equal rights amendment were embodied in there, we would not be dragging our feet as to the lack of equity in the present Social Security System. We would address it and that might mean new taxes, it might mean a new type of system in some manner. But we do not seem to be moving very rapidly toward equalizing what I consider as a discriminatory approach to Social Security for women.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator DeConcini.

The bottom line is that these are all legitimate areas of controversy and the question here is should the debate be in Congress or should it be constitutionalized in some unclear way and removed from Congress discretion? Because nobody here today has told me clearly what the impact of the ERA is going to be. Nobody knows. I do not know. And, when I do not know, I have some real questions about whether we should amend the Constitution. And when someone says that Congress will be forced to act on these things, I do not think Congress is forced to do anything. I do not think the Supreme Court can force us to do anything. I do believe, however, that most Members of Congress want to be fair—with or without the ERA.

The problem I have with the equal rights amendment is that I just do not know how it is going to work.

What we are discussing are legitimate areas of controversy. I am not sure that the equal rights amendment is going to resolve any of them.

I know that it is difficult to describe in detail the requirements the equal rights amendment will impose on the Social Security System, but let me explore with both of you several general points.

Would there, for example, be any requirement that divorced women will be able to retain spousal benefits and insured worker's benefits?

Ms. SHERBURNE. There would be no requirement for a specific kind of reform under the equal rights amendment.

Senator HATCH. In this specific——

Ms. SHERBURNE. I do not think that this specific reform, from any public policy perspective, would be appropriate. But that is my personal view. The equal rights amendment certainly would not require it.

Senator HATCH. Do you agree with that?

Mrs. FINN. Yes.

Senator HATCH. Would there be any requirement that divorced women would be entitled to derivative benefits whether or not a marriage has lasted for some minimum period of time? For example, what about the present 10-year requirement?

Mrs. FINN. I think reformers will argue the ERA would require such changes. I think it is a legitimate legislative question.

Ms. SHERBURNE. The equal rights amendment would require a look at that because it is not fair that a woman is penalized for spending years out of the home.

Senator HATCH. Because of an artificial time barrier chosen by the Social Security System?

Ms. SHERBURNE. Because of a statutory provision that operates to deny that woman access to benefits.

Senator HATCH. So ERA may require that statute to be overturned and replaced with another?

Ms. SHERBURNE. I think the fairness that the ERA would mandate would require a close look at whether or not that provision, in fact, is fair. I would think that——

Senator HATCH. You do not believe that is fair?

Ms. SHERBURNE. I do not believe that is fair, no, sir.

Senator HATCH. Would the ERA require the alteration of any aspect of the present Social Security System premised upon the fact that a majority of married women are economically dependent upon their husbands?

Mrs. Finn?

Mrs. FINN. No, I do not think so. I do not think it would require that the Social Security System be changed because I do not think you could show that it discriminates and that there is a disparate impact against women.

Senator HATCH. Let me clarify this point again, Ms. Sherburne. Are married women with careers outside their homes treated identically to other workers, male or female; and would they be under the equal rights amendment?

Ms. SHERBURNE. Married women with careers—paid careers outside the home?

Senator **Hatch**. Let us do it this way: Presently, are married women with careers outside the home treated identically to other workers, male or female?

Ms. **Sherburne**. The system is facially gender neutral. Yes, married women with careers outside the home do have the same access to benefits that men have who are working outside the home.

Senator **Hatch**. Would the ERA require that Congress reassess the balance that it has created in the Social Security Program between equity and adequacy; and, if so, would it require the Congress to reassess this balance: Say the concept of weighted benefits which provide disproportionately high benefits to lower income as opposed to higher income workers?

Mrs. **Finn**. No, I do not think it would mandate the changing of the objectives of social programs. But what reformers seek using the rhetoric of discriminatory or disparate impact against women is the elimination of a major adequacy benefit, the wife's benefit, in order to strike a new balance between equity and adequacy, making the two-income family, the preferred life-style better off.

Senator **Hatch**. What about you, Ms. Sherburne?

Ms. **Sherburne**. I believe that the balance that is struck between equity and adequacy is a political judgment, that it is not something that is driven by sex stereotypes and that it is not something that the equal rights amendment would reach.

Senator **Hatch**. OK.

On March 5, 1984, the Supreme Court in its *Heckler* v. *Matthews* decision held that a Social Security pension offset applicable only for men did not constitute unconstitutional gender-based discrimination under the equal protection component of the fifth amendment. This decision seemed to seriously disadvantage the male Social Security beneficiary compared to female Social Security beneficiary.

Are you both familiar with that decision?

Ms. **Sherburne**. Yes, sir.

Mrs. **Finn**. Yes.

Senator **Hatch**. OK.

Would the *Heckler* v. *Matthews* decision have been decided similarly if the ERA had been part of the Constitution? Will the ERA overturn *Heckler*?

Mrs. **Finn**. Yes, I think that it is clear that the ERA clearly would establish a different standard than the equal protection standard of the fifth amendment. It says that you cannot have any gender-based distinctions. I think that even if it could be shown to be serving an important governmental objective, it would be overturned under the ERA. I think this is a good illustration of why we do not want to pass the equal rights amendment, because I think this decision is just and I think under the ERA we would not be allowed to make this kind of distinction on the basis of gender.

Senator **Hatch**. Ms. Sherburne, do you agree?

Ms. **Sherburne**. I agree that the *Heckler* v. *Matthews* decision is something that should guide us in how we anticipate phasing in the kinds of reforms that would be served by the equal rights amendment. *Heckler* v. *Matthews* says that even though the Constitution forbids the kind of sex discrimination that the *Goldfarb* decision struck down, that kind of discrimination will be allowed to be perpetuated for a limited period of time if it is very narrowly drawn and if it is necessary in order to protect legitimate retirement expectations; in other words, if the time limited discrimination is serving an important and significant governmental interest and is narrowly tailored to serve that interest. That decision provides us with guidance about how reforms might be phased in under the equal rights amendment.

Senator HATCH. You do not think *Heckler* would be overruled then by the equal rights amendment?

Ms. SHERBURNE. I wish I had a crystal ball to use to say "no" with certainty. But no, I do not think the equal rights amendment would overrule *Heckler* v. *Matthews*. I do think the opinion is instructive as we plan for phasing in reforms that might be forthcoming under the ERA.

Senator HATCH. Even though males would seem to be disadvantaged?

Ms. SHERBURNE. I think that the equal rights amendment, as the 2-year period in section 3 of the amendment indicates, would require some time to be implemented and the Social Security——

Senator HATCH. Let us say that it is fully implemented now. Would *Heckler* be overruled because males would seem to be treated in a discriminatory fashion?

Ms. SHERBURNE. To understand you: that the Social Security reform is fully implemented or that the 2-year period after ratification is elapsed?

Senator HATCH. The post-ratification period for the ERA.

Ms. SHERBURNE. I think what *Heckler* v. *Matthews* tells us is that in a program like Social Security, on which people rely so heavily and on which they depend so mightily for their subsistence in retirement, as disabled people and as survivors, if a reform is crafted to rectify a discrimination, and that it is clear that that discrimination is ultimately being eliminated, the constitution tolerates a limited period of unfairness if it is narrowly tailored and justified by an extremely compelling interest.

Senator HATCH. OK.

Ms. Sherburne, as you know, Social Security benefits for female beneficiaries are not reduced at all despite their substantially longer life expectancy.

How would you respond to those who argue that this tends to have a serious disparate impact upon men and hence discriminates against men? It is my understanding that at age 65, the average woman has a life expectancy well over double that of the average man at this particular age.

Does not the provision of equal monetary benefits, despite such actuarial realities, tend to have some discriminatory impact upon males?

Ms. SHERBURNE. I think what you are looking at is a situation where 23 percent of aged widows live in poverty, and so I am not quite sure that that long life is a blessing if it puts them in a position where they are living in poverty.

Senator HATCH. I disagree with that. But we are not talking about poverty. We are talking about discrimination toward males that clearly would exist under the present system.

Ms. Sherburne. I am not familiar with the *Manhart* decision where actuarial tables and differences——

Senator Hatch. But you would agree that if women have double the life expectancy of men at age 65 and yet women continue to draw all their benefits, then that would be discriminatory against men? Yield a disparate impact against men?

Ms. Sherburne. Men would certainly be receiving fewer benefits although they would have the same protections.

Senator Hatch. Would that be a disparate impact?

Ms. Sherburne. I would prefer to submit an answer to you in writing after I have had a chance to review those tables, and the decisions that relate to that analysis.

Senator Hatch. OK.

I might add that those *Manhart* and other decisions are not under the equal rights amendment.

[The following was subsequently received for the record:]

The Supreme Court decisions in *Los Angeles Department of Water and Power* v. *Manhart* and *Norris* v. *Arizona Governor's Committee* found that exacting higher contributions from, or paying lower benefits to, women because of differences in the life expectancies of men and women is sex discrimination. This analysis would lead to the conclusion that, were such differences included in the social security benefit structure, they would be struck down as unlawful sex discrimination under the Equal Rights Amendment.

Senator Hatch. Mrs. Finn, what is your point of view?

Mrs. Finn. Well, I think Social Security does have a disparate impact against men, but I do not think and I surely hope that the ERA would not mandate changing Social Security to have an equal outcome on the basis of sex. I think that is an inappropriate standard. I have not argued that there is no disparate impact against women in order to suggest that the ERA should do something to help men. I think that is an inappropriate standard for a social program like Social Security. I think the fact that you cannot show a disparate impact against women and that the disparate impact is against men, is useful only in a context of the debate over ERA and Social Security reform. The point is that there is no basis for what the reformers have been trying to do to restructure Social Security. They are using the ERA to obtain their political goals.

Senator Hatch. Well, Ms. Sherburne, is it fair to say that rhetoric notwithstanding, the alleged inequity against working women who are married is really a question of the treatment of two wage-earner families versus single-earner families; would that be correct?

Ms. Sherburne. Yes, Mr. Chairman, I think that is a correct characterization.

Senator Hatch. Do you agree with that?

Mrs. Finn. Yes. And therefore it is a sex neutral question.

Senator Hatch. Well, if this issue is going to rise to constitutional magnitude under the equal rights amendment as an instance of gender discrimination, is it not also gender discrimination that our income tax laws treat two-earner families differently and less advantageously than single-earner families with identical incomes. If the Social Security situation raises issues under the ERA, does not the so-called marriage penalty in the income tax system raise the same issues?

Ms. **Sherburne**. Senator, I am not an expert in that area, and I would hope that you could get some advice on that from someone who has studied the marriage penalty and the income tax system.

Senator **Hatch**. It is certainly an analogy.

Ms. **Sherburne**. It is an analogy in the sense that the Social Security Program, as a social program, has chosen to favor families over single people. That is a political choice and that is one, as you suggested earlier, that the Congress has the prerogative to make.

Senator **Hatch**. Mrs. Finn?

Mrs. **Finn**. I think the lack of horizontal equity within the income tax structure which was introduced by the marriage tax reform is an example of the problems with evaluating the outcomes of a social program like Social Security. Social programs cannot be expected to produce equal outcomes for different groups like the two-income family versus the one-income family. Nor can they be required to be neutral in some sense. The wife's benefit in Social Security is needed to offset the advantage given to two-income families in the marriage tax reform and also in the substantial child care deductions. It is a different way of encouraging or subsidizing different families. I do not think you could look at each social program and demand that the outcome to whatever different groups should be the same, especially when you are not talking about violations of rights or questions of sex neutrality or sex discrimination.

Senator **Hatch**. Ms. Sherburne, several State court decisions in a few western community property States have held that Social Security benefits are not divisible community assets.

Would the equal rights amendment require that such decisions be overturned?

Ms. **Sherburne**. I think the equal rights amendment would require, as I have stated earlier, a look at the fairness of those kinds of decisions. Those decisions were based on the supremacy clause, which means that because the Social Security Act is a Federal program, States do not have the power to alter its benefits. I am not familiar with the basis of those decisions beyond that, but doubt the equal rights amendment would affect them because it would not interfere with the supremacy clause.

Senator **Hatch**. Would the ERA mandate that all States adopt a community property type approach?

Ms. **Sherburne**. Would the ERA mandate that?

Senator **Hatch**. Yes.

Ms. **Sherburne**. The ERA would mandate fairness——

Senator **Hatch**. That seems to me to be no different than what we have today. We have a mandate for fairness in everything that we do, and if the ERA does not do anything more than that, then why have it? Either it does something or it does not. Maybe we differ on what is fair, but we all have the obligation to be fair—the Congress, the courts and the President.

Ms. **Sherburne**. Senator, I think that the structure of the Social Security Program is an unfortunate example of how we have not done that.

Senator **Hatch**. The Congress believes they have been fair. Maybe they have not been. But the court cannot tell Congress what programs to pass. All it can do is rule on which programs are constitutional and which are not. I am asking you what kind of programs will be allowed if the ERA is passed? What will be deemed to be fair.

Mrs. Finn?

Mrs. **Finn**. Well, I agree with you. I do not see what this mandating fairness means. It just does not communicate judicial standards for Congress to follow, or to tell them what definition of fairness is going to be required by this new addition to the Constitution. This is what is lacking in the argument.

Ms. **Sherburne**. In the Social Security area, we are fortunate that so many people have recognized that these unfairnesses exist and have taken the steps that, I agree, must be taken, or that we would hope the Congress would take, to rectify——

Senator **Hatch**. But a majority of Congress decided that the current system is fair.

Now, is the court going to overrule the decisions of Congress in favor of the judges' own concepts of fairness, or is the court just going to say to Congress, well you have to be fair in these issues? Either the ERA mandates something or it does not. Will it mandate legislative options that the Congress has considered and rejected?

Under the ERA, would Social Security have to be amended to reflect neutrality as between those workers whose participation in the work force is continuous and those whose participation is intermittent, or subject to interruption? You mentioned women have that problem; at least it seems to be one of their major problems with regard to Social Security.

Would ERA require a neutrality in that area?

Ms. **Sherburne**. The ERA would not require any particular reform in this area. As long as women were not disadvantaged by the program, the equal rights amendment would be satisfied. To the extent that the program operates to disadvantage women because it treats workers with continuous attachments to the work force more favorably than workers who spend periods of their lives as unpaid workers and then periods of their lives as paid workers, the program should be reformed in order to make it fair.

Mrs. **Finn**. Well, I think if the court did answer that question for us, it would be legislating. How Congress wants to design a program is their prerogative, since you cannot demonstrate that women are disadvantaged by Social Security.

Senator **Hatch**. In your Georgetown Law Journal article, you concede that the Social Security Program was not adopted because of its discriminatory impact on women. Since you have suggested that the ERA would necessitate a variety of changes in Social Security, you are operating under the premise here, are you not, that the ERA will incorporate a disparate impact model of discrimination.

Am I correct in deducing that from your argument?

Ms. **Sherburne**. I believe that the equal rights amendment should reach beyond facial discrimination to take a look at the effect of the social programs on women, yes.

Senator **Hatch**. OK. Would this require that benefits currently payable to survivors of short marriages be reduced?

Ms. **Sherburne**. Again the equal rights amendment would not require any particular reform. Survivors of short marriages are not a particularly disadvantaged group.

Senator **Hatch**. In your article, you state that the Social Security reformers must be "prepared to make difficult choices and perhaps tolerate unpopular results to achieve the ultimate goals of reform."

Now, would the equal rights amendment require the adoption of any unpopular results or the resolution of any difficult choices?

Ms. **Sherburne**. Again the equal rights amendment would not require any particular kind of reform. Reform in this area is extremely complicated. There are some very able groups that are looking at various ways to implement some of the reforms that have been suggested. These groups are hoping to discover what the impact would be on various reforms on different groups of beneficiaries and taxpayers and to discern where those tradeoffs might be undesirable, how they might be mitigated, what kind of transition features could be devised, what the cost would be of making tradeoffs less desirable or more desirable. That kind of work is underway and, hopefully, the study that HHS is coming out with in July will provide a wealth of information on these kinds of questions.

Senator **Hatch**. But, we can do all that without the equal rights amendment.

Ms. **Sherburne**. I think it is admirable that this kind of effort is being undertaken without the equal rights amendment.

Senator **Hatch**. I do too.

Ms. **Sherburne**. The equal rights amendment will demonstrate that there is a commitment to ensuring this kind of effort is undertaken and resolved.

Senator **Hatch**. You state, however, that no particular reform would be required

Can you think of any reforms that will fully satisfy the ERA standards other than the ones that you have mentioned earlier in the discussion today?

Ms. **Sherburne**. I do not suggest that all the possible reforms are on the table. I believe that a number of them have been looked at pretty carefully, and the ones that are most promising and seem to have generated the most support among policymakers are being studied in greater depth.

Senator **Hatch**. Under earnings sharing, am I correct that a divorced spouse would be entitled not only to levels of earnings but also to the number of quarters of coverage? In other words, could earnings sharing result in workers who are eligible say for disability benefits suddenly to lose such eligibility if it occurs shortly after a divorce which has divested him of some of his quarters of coverage? Would this be required by the equal rights amendment?

Ms. **Sherburne**. That certainly would not be required by the equal rights amendment. That is a feature of earnings sharing that we have been struggling with for years to determine how you deal with insured status requirements when earnings are shared. There are a variety of different ways that that can be done. You could structure it so that once a worker gains insured status, they would not lose it by sharing earnings. And when you share credits, you share insured status. There are a variety of different ways that this kind of problem could be approached. And those are the kinds of things that we are hopeful that this HHS study will help us understand better.

Senator HATCH. Mrs. Finn, do you agree with that?

Mrs. FINN. Well, to date, no one has been able to work out the bugs in earnings sharing. It has been debated and analyzed by all kinds of groups, by the advisory council and the National Commission on Social Security, and none of them are willing to endorse it because it introduces as many inequities as it solves. And this is one illustration of it. You can either add dramatically to the cost by increasing the disability and survivor protection for both individuals in a family, one of whom pays taxes, or you can split it equally, but then you have this problem that if you have a disabled primary earner, the total income for the family might be lost and yet the family would only have one-half the disability insurance they have under present law. That is a severe disadvantage which most reformers of Social Security are unwilling to introduce into the system. Social Security is enormously complex, and these problems of looking at little groups within Social Security are always problematic, and you just cannot undertake this kind of wholesale reform without introducing more of these problems.

Senator HATCH. Maxine Foreman of the Women's Equity Action League has suggested that the Social Security System discriminates against minority women in particular. Among the illustrations of such discrimination that she raises are the prospective elimination of the minimum benefit, delays in the COLA adjustments, and the gradual raising of the full benefits age from 65 to 67.

Do you agree with Ms. Foreman in her observations?

Ms. SHERBURNE. There have been analyses prepared by the Social Security Administration about the program's effect on minorities and I believe the data have been broken down by sex. I am not familiar with the data but I am sure it could be made available to you.

Senator HATCH. OK.

Mrs. Finn?

Mrs. FINN. I do not see that there would be any impact because no discrimination can be shown and I think it is inappropriate to look at disparate impact on particular groups, minority women.

Senator HATCH. Well, would the ERA require any legislative changes along the lines suggested by Ms. Foreman in order to eliminate discrimination against minority women?

Ms. SHERBURNE. I am unfamiliar with the changes that she is recommending so I am not in a position to answer your question, Senator.

Senator HATCH. OK.

Mrs. FINN. It seems to me in order for ERA to impact on Social Security, it would have to be shown that one sex or the other is disadvantaged in the aggregate by the system. It would not impact on particular aspects of Social Security which might have what some consider unfair effects or inadequacies.

Senator HATCH. Given that the clear effect of the earnings sharing proposal is to transfer dollars from single-earner families to double-earner families, is it not pretty clear that the impact of this proposal would be to redistribute moneys from the relatively less well off to the relatively well off? Could your proposal have any other impact really?

Ms. SHERBURNE. It is not an accurate characterization to say that earnings sharing would transfer dollars from single-earner families to double-earner families. Earnings sharing would entitle both spouses of a single earner couple to survivor and disability protection, adding protection—not losing it.

Second, I do not think it is clear that single earners are necessarily worse off than two-earner families in the sense that they are getting the contribution of someone working in the home and that in itself has a lot of value.

Mrs. FINN. I think the one-income family would clearly be worse off under earning sharing unless you have a hold harmless provision, or voluntary earnings sharing, where families would only choose earnings sharing if it were to their greatest advantage which would be hopelessly expensive. Mandatory earnings sharing, as proposed by most reformers, would redistribute income from the one income to the two-income family by the elimination of the wife's benefit. Cutting the benefits for the one-income family by one-third, in that the family would share one benefit instead of one and one-half benefits in retirement.

Homemakers would then, as I said before, also share half of the survivor benefits and half of the disability benefits with their spouses. But speaking as a homemaker I would not be better off and I would not want to do that because all of our income comes from my husband, the primary earner in my family. And if he were disabled, it would not give me any comfort that we would have only half of the insurance that we now have under the present system. And I do not want to see the Social Security taxes raised to pay for full disability for homemakers for several reasons. I think disability under Social Security is the most problematic part of the program, this is where the costs have been increasing at the greatest rate, and it would be difficult to administer, given that there are no lost earnings to replace. I think it is unwise to extend disability coverage to homemakers and I think that even under ERA, such an expansion of the system would not be required. I do not want individuals to pay higher taxes to pay for disability insurance or survivor insurance for homemakers, but splitting them within the one-income family certainly makes no sense given the original purpose of Social Security. And that was to replace lost earnings to the family.

Senator HATCH. Let me just ask one other question.

The congressionally mandated Commission on Social Security back in 1981, which had the advantages of studies made by the Advisory Council on Social Security in 1979, and earlier HEW task forces, stated "It is difficult to support the charge that the Social Security System is on the whole unfair to women."

Are you both aware of that?

Mrs. FINN. Yes, I am aware of it and I fully agree.

Ms. SHERBURNE. I am not aware of it and I do not agree.

Senator HATCH. Well, that was the conclusion that they made. I thought that I would simply introduce it for the record. This has been a technical discussion and both of you I think deserve a lot of credit for being here and being as well prepared as you both have been.

Senator Kennedy may have some questions to submit, and we will keep the record open for a reasonable period of time for any member of the Judiciary Committee to ask any questions that he would care to ask.

Ms. **SHERBURNE**. That would be fine.

Senator **HATCH**. In summation, it seems that earnings sharing and the homemaker tax proposal are two ways by which Congress can satisfy this "fairness" mandate under the ERA. These may not be the only possible proposals, however, but they are illustrative of what I think will be required by the equal rights amendment.

Now, would that be a correct statement or am I overstating it?

Mrs. **FINN**. I think it will be argued that fairness under ERA would require these reforms. And I would not sit here and tell you that the courts would not take account of the reform literature and feminist organizations and make some interference in this basically legislative question along the lines you are suggesting.

I would hope that the sex neutrality and the lack of disparate impact against women would keep the ERA from impacting on Social Security at all, but I do not want to let the courts decide and thus I oppose ERA.

Senator **HATCH**. Ms. Sherburne?

Ms. **SHERBURNE**. I believe that any proposal that is before the Congress, in the wake of the passage of the equal rights amendment, would have to be carefully scrutinized. I think the earnings sharing proposal is a promising reform. Whether or not it would fill the bill, would certainly have to be looked at with the kind of care that this reform proposal is receiving now.

Senator **HATCH**. When you say it has to be looked at, who is going to look at it?

Ms. **SHERBURNE**. HHS, with their expertise, the Urban Institute, various commissions, the Congress and committee staffs. An orderly process of careful reform will ensure that the reform does do the job that we want it to do.

Senator **HATCH**. I see.

Mrs. **FINN**. I do not know about you but I just do not see what it means to mandate fairness.

What does it say to the Congress? Ms. Sherburne says that it is inappropriate to use the kind of analysis that I am suggesting, the rate of return to taxes paid that clearly shows that women are not disadvantaged by Social Security. But then what kind of analysis is appropriate? Do we just say, well, women—or homemakers do not have disability insurance in their own right? Is this really a constitutional question? Is it even a sex discrimination question? It seems to me it is a legislative question of whether or not we want to increase or expand Social Security to include such coverage and therefore pay the cost of it and also who is going to pay the cost of such an expansion.

But I have not seen in all of the things I have read about how ERA would mandate fairness with respect to how Social Security is reformed, anything substantive or with much content. I can not find what the judicial principles are, or what the evaluation criterion would be. If my analysis is inappropriate, what analysis is appropriate? What standard of fairness is going to be used?

Senator HATCH. Ms. Sherburne, what standard of analysis would be appropriate to satisfy this fairness requirement that you have been talking about?

Ms. SHERBURNE. I think the analysis that is appropriate is one that takes a look at how women fare in every benefit category. The access to protection for a woman is interfered with because she has a lifestyle pattern that is different than that of an average man. Social Security costs us $178 billion. A social program of that enormity, almost a quarter of the entire Federal budget, cannot be allowed to treat women in a disadvantageous way. The fairness of the program has to be looked at and, as I suggested, is already being looked at. There is widespread acknowledgment that the program is unfair.

Mrs. FINN. But how can all of these different groups of women be disadvantaged when women in the aggregate get twice the benefits relative to taxes paid? Some women must be advantaged over others. Some may be disadvantaged, and I do not doubt that there are legislative questions here. However, how can it be that women in the aggregate are shortchanged? Some women must be faring well if women in the aggregate pay 28 percent of the taxes, and they get 54 percent benefits. They are going to continue to do well under Social Security in the future as well.

Ms. SHERBURNE. It is also projected into the future that until the year 2030, which is as far ahead as the actuaries are looking that women's retirement benefits will remain at two-thirds of men's retirement benefits because the paid and unpaid work patterns of women are not projected to change.

Senator HATCH. Maybe I am missing something, Mrs. Finn, but I do not believe your form of analysis rejects looking into the areas that Ms. Sherburne has said you must look into.

Mrs. FINN. It looks into all of them. We are talking about how women fare under Social Security, and it has to be adding up all these groups that we are discussing here and assessing the impact by sex. The rate of return to the taxes paid by sex is the only way I know to get at a measure of disparate impact.

Senator HATCH. But the form of analysis that you have described seems to embrace what Ms. Sherburne has said is important.

Mrs. FINN. I would think so.

Senator HATCH. What you are saying is that even though you may have some differences in these areas, on balance you feel the Social Security System does not discriminate against women?

Mrs. FINN. I do not think it discriminates against women and I do not think that you can show on the whole women are disadvantaged under Social Security. If you take all of the——

Senator HATCH. Then why does Ms. Sherburne feel as strongly as she does?

Mrs. FINN. Well, I guess we have to let her answer that.

Senator HATCH. Why do you think she does?

Mrs. FINN. Well, she has a different position to defend because how could it add up that women get twice the benefits relative to the taxes paid, if all of them are disadvantaged by Social Security? Most reformers who support earnings sharing want to eliminate the wife's benefit because they do not want women to be homemakers and they do not want one-income families to receive this benefit without paying taxes for it.

Senator HATCH. What I have learned from this discussion is that even though both of you have analyzed the Social Security system in a similar fashion, the conclusions that you draw from your analysis differ significantly. Ms. Sherburne suggests that there would be a new concept of fairness mandated by the enactment of the equal rights amendment. But, there are good Members of Congress who want to be fair who differ with you. Just like you two have differed here today. But that is what the legislative process is all about—we analyze, we debate, we attempt to compromise, but ultimately we have to vote up or down on what should be done. And sometimes the result may not seem fair to all the parties concerned. But that does not mean that we should inject the courts into this to resolve these difficulties when these types of issues, it seems to me, are better resolved by elected and accountable officials who have to go through the fire, so to speak, of meeting these problems head on in official legislative bodies.

A lot of people believe that earnings sharing and homemakers' tax are two potentially radical and undesirable alterations of the Social Security System. My question is: Should we constitutionally mandate such reforms? I realize that you do not believe that the ERA will constitutionally mandate any specific reform, but there are some who not only agree with you on those so-called reforms but assert that the equal rights amendment will mandate them.

These are the problems that I have had with the ERA from the beginning.

So all I can say is that I deeply respect both of you. You have raised issues that need to be addressed in the future. I want to express the gratitude of the committee and my personal gratitude for both of you taking the time to be here.

So with that, we will recess these hearings.

Mrs. FINN. Thank you, Mr. Chairman.

Senator HATCH. We will recess the subcommittee until further notice.

[Whereupon, at 11:35 a.m., the subcommittee adjourned, subject to the call of the Chair.]

[The following was received for the record:]

MISCELLANEOUS MATERIAL

STATEMENT BY ROBERT J. MYERS BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, COMMITTEE ON THE JUDICIARY, U. S. SENATE, MARCH 20, 1984

I appreciate the opportunity to discuss the situation of women with respect to the Old-Age, Survivors, and Disability Insurance portion of the Social Security program, especially as to the possible impact of the Equal Rights Amendment thereon.

My experience in the Social Security area has extended over almost 50 years. I held various actuarial positions with the Social Security Administration and its predecessor agencies from 1934 to 1970, and was Chief Actuary during the last 23 years of that period. In 1981-82, I was Deputy Commissioner of Social Security. In 1982-83, I was Executive Director of the National Commission on Social Security Reform. Following the completion of the National Commission's assignment, I have engaged in consulting work in the Social Security field.

I am not an expert on constitutional law, although I have had considerable experience in drafting and interpreting Social Security legislation. In summary, in my opinion, the passage of the Equal Rights Amendment would not result in any change whatsoever in the structure and operations of the OASDI program, because, with one minor exception, all gender differences in the program have been eliminated. I shall discuss these views in more detail after describing how equal treatment by sex was not always present, and how it has now been achieved. I shall also take up the allegation that the program unfairly discriminates against women.

Before proceeding with the specific subject of this session, I would first like to mention certain personal convictions. I have always strongly favored the general principles underlying the Equal Rights Amendment. I also favor the principle that employee benefits should, with all other circumstances being the same, provide equal benefits for men and women even though the plan's cost is higher for men than for women (e.g., for survivor benefits) or, on the contrary, is higher for women than for men (e.g., for pensions).

However, I believe that, in the case of individually-purchased insurance, where equity concepts should be predominant, so-called unisex tables should not be used. For some forms of insurance (e.g., life or automobile), they produce inequitably high rates for women, while for other forms (e.g., annuities), the reverse occurs.

In the same manner, I believe that age should be a determinant factor in setting premium rates for individual policies when this element makes a significant difference. Thus, for example, for life insurance or annuities, a woman aged 60 should not be charged the same rate as a woman aged 65. This equitable discrimination by age in determining premium rates produces about the same differential in the rates as exist between rates determined for sex-separate tables as between a man and a woman of the same age.

Now, turning back to the OASDI program, it is true that, in the past, there were a number of unfair discriminations by sex. Some were against men, and others were against women. Probably the most unfair was with regard to child survivor benefits. When first incorporated in the program in 1939, they were available in all cases with respect to male workers, but with severe restrictions in the case of female workers. Over the years, these restrictions were lessened. Finally, the 1967 Amendments provided for completely equal treatment. This desirable result was largely due to the efforts of Congresswoman Martha Griffiths. I am proud that I was able to furnish her technical assistance in achieving this result.

An unfair discrimination in the other direction is with regard to retirement benefits for men who attained age 62 after 1954 and before 1975. With all other elements, such as date of birth and the earnings record being identical, the benefit for a woman in that range of years of birth is significantly higher than for a man. If I might inject a personal note, my Social Security benefit is about $14 per month less than that of a woman born in the same year and with an identical earnings record.

The 1983 Amendments eliminated prospectively all gender differences in the law on which the OASDI program is based, with one minor exception, which I will discuss later. This elimination was proposed in the 1977 Republican Alternative Bill, which was introduced by Congressman Barber Conable at the time that the 1977 Amendments were being legislated. These provisions were incorporated in the House version of the Bill, although not included in the Senate version and were dropped in conference. The elimination of all gender differences in the law was long overdue, although in practice many of these differences had been eliminated by court decisions, so that the law merely needed "cleaning up".

The 1983 Amendments also included several benefit changes which primarily affect women -- for example, benefits will be payable to an eligible divorced spouse after the other spouse is eligible for benefits even though not receiving them (because of non-filing or because of substantial employment). I believe that all of these incremental changes were highly desirable.

We come now to the basic question of whether the OASDI program is significantly unfair to women, as some allege. I believe that this is not the case, although certain incremental changes might well be made. Let me first discuss various criticisms of inequity that have been made.

It is sometimes stated that the program is demeaning to married women, because they are paid spousal benefits on the grounds of dependency. Actually, this is not the case, because the law provides that spouse's and widow(er)'s benefits will be paid on the basis of legal status. The fact that a woman might have substantial financial resources of her own, and by no means be dependent on her husband, is not relevant to whether benefits are paid. Moreover, I fail to see any more stigma being attached to receiving benefits on another person's earnings record than to receive a portion of that person's earnings record, as earnings-sharing proposals would do.

Another point frequently made is that the duration-of-marriage requirement of 10 years in order for a divorced person to be eligible on the other spouse's earnings record is too long. It is my belief that the incremental change of reducing this requirement to 5 years -- as it was in the 1977 Republican Alternative Bill -- would be desirable.

Perhaps the most frequent argument made as to inequitable treatment of women is in the case of those working in the paid labor market. It is alleged that the result is inequitable because the female worker will often, at retirement, receive benefits based on her husband's earnings record instead of on her own record, because the former is larger than the latter. Therefore, it is argued that the female worker has paid OASDI taxes and has received nothing from them. In the first place, this is not true, because she had disability and young-survivor benefit protection. Also, in some cases she could have received retirement benefits before her husband ceased working.

But even so, this is not a valid objection, because OASDI is not an individual-equity program. Desirably, its social-benefit nature results in relatively large benefits as compared with taxes paid for many groups -- low-income workers as against high-income workers; workers with children as against those without children; and older workers when the system began as against younger workers. Conversely, relatively small benefits as compared with taxes are paid for other groups.

Furthermore, one little-recognized feature of the program tends to favor female workers, who often are not in covered employment for all of the period possible. Persons who have longer periods of coverage than that over which average earnings are computed (eventually 35 years) will frequently have no advantage from such longer coverage, and will have higher taxes than persons who have exactly the maximum number of years required.

All in all, the OASDI program involves a broad social pooling of the risks insured against -- and not individual equity, under which principle everybody gets their exact money's worth, no more and no less. Lower benefit rates are, for example, not payable to categories who have longer-than-average life expectancy, such as women and residents of Hawaii.

A related criticism frequently made is that, for two families with the same total earnings record, the two-person, two-worker one receives substantially lower benefits than the two-person, one-worker one. Actually, other than for total earnings income, these two families are substantially different from a social and economic standpoint. Thus, there is no reason why their Social Security benefits should be identical. For example, the two-person, two-worker family has more disability, more young-survivor, and more early-retirement benefit protection, while the two-person, one-worker family has more retirement and more aged-survivor benefit protection. In any event, those who criticize this situation adversely are not taking into account that OASDI is on a social-adequacy basis, not an individual-equity basis.

Although the two-person, two-worker family with the same earnings record as a two-person, one-worker family does not fare as well from a benefit standpoint, the same is true for a one-person, one-worker family as against a two-person, two-worker family, both with the same earnings record. Such apparent dilemmas will inevitably appear in a program geared to provide socially-adequate benefits, rather than individual-equity ones.

For these reasons, I cannot at all agree with those who allege that the Social Security program is founded on sexist assumptions or that it has a disparate, sex-discriminatory effect on women and, accordingly, should be modified to treat women more fairly. As it is now, women probably make out better under OASDI from an actuarial and financial standpoint because of their lower mortality and thus higher life expectancy.

Although the average benefit is lower for female workers than for male workers, this is not really meaningful -- as is often the case for any blind comparison of averages. Such a situation results from the lower -- on the average -- earnings of women, which may be due to differences in the periods of working -- and thus paying OASDI taxes. In any event, the question of equality of pay is not one for OASDI to solve.

I might mention that more complete discussion of the historical development of equal treatment by sex under the Social Security program is contained in my chapter, "Incremental Change in Social Security Needed to Result in Equal and Fair Treatment of Men and Women" in R. V. Burkhauser and K. C. Holden, "A Challenge to Social Security -- The Changing Roles of Men and Women in American Society", Academic Press, 1982).

One solution proposed by many who believe that OASDI is unfair to certain female categories is earnings sharing. Under this approach, the earnings of a married couple are pooled as they are earned, and are then divided in half. Philosophically, I strongly support this approach as being what marriage is all about. However, I know of no person, female or male, who has a thorough knowledge of the fiscal and administrative aspects of the OASDI who believes that it is feasible to drastically revise the program in this manner. Either there will be persons with large benefit losses -- as well as those with large gains -- or else the cost of the program will be greatly increased if nobody is to lose out benefit-wise.

Another suggested approach is to provide earnings credits for homemakers. Once again, I strongly support this concept philosophically, but no feasible way exists to put it into effect, nor is it really necessary in order to provide equitable treatment for this category. Among the unsolvable dilemmas and the problems are whether the procedure should be based on payroll taxes on these credits or on general revenues, whether the procedure should be voluntary, and how much the credits should be.

Incremental changes are possible to alleviate some of the situations discussed previously. For example, child-care credit years in computing average earnings for benefit purposes might be universally provided. Or, if more individual-equity aspects are desired for two-person, two-worker families, by far the best approach is that in the 1977 Republican Alternative Bill -- namely, to provide a working-spouse's benefit for the spouse who has the lower primary benefit, in an amount equal to 25% of the lower of such spouse's benefit based on own earnings record or the benefit coming from the other spouse's earnings record.

The problem with any changes in benefits such as just described is that, if they accomplish anything significant, the cost of the program will be increased greatly. This means that either higher payroll taxes will be needed, or else the rate of growth of other benefits will have to be lessened. Neither of these is easy to accomplish. Nonetheless, the OASDI program is a flexible one that is not restricted by benefits having an ironclad guarantee of maintenance or by strict individual-equity concepts. Accordingly, the program must be continually examined to determine ways in which it can be improved in a reasonable and equitable manner.

Now, turning back to the matter of the effect of the Equal Rights Amendment, if enacted and put into operation, on the OASDI program, I can see no reason at all why any changes in the benefit structure would be necessary. With one very minor exception, all gender differences have now been removed from the program as to prospective benefits. The statute itself has a few apparent differences, but the Social Security Administration is administering the law in such cases under court decisions which require equal treatment by sex.

One technical error involving unequal treatment as between divorced husbands and divorced wives, as to an effective date, is in the process of being remedied. This is being done by Section 402(c) of H.R. 3805, introduced by Mr. Rostenkowski, and now pending before the House of Representatives, having been incorporated in H.R. 4170.

The single gender difference remaining in the OASDI program is with regard to the treatment of self-employment income in community-property states. The difficulty with remedying the unequal treatment by sex was that no agreement as to the best way to do so. S. 501, introduced by Senator Dole, which has been reported out by the Committee on Finance, would provide equal treatment by sex in this matter.

Finally, let me take up the allegations by some that the ERA will require that earnings-sharing provisions be incorporated in the OASDI program or that homemaker credits will thereby be required under OASDI. I see no basis for such assertions. As indicated previously, the program is not founded on sexist assumptions, nor does it provide unequal treatment to women (or to men).

In particular, homemaker's credits would not have to be provided under the OASDI program. These have always been implicitly and completely provided through the spousal benefits that are payable as a legal right, regardless of dependency. In essence, the spousal benefits are payable under the presumption that the spouse is providing an economic contribution to the family through her or his work in the home. If this presumption is not correct in the actual situation, then the matter is rectified by the anti-duplication provision, which reduces the spousal benefit by the benefit paid to the individual on the basis of employment in the paid labor market.

In summary then, I believe that no changes in the Social Security program would have to be made if the Equal Rights Amendment were to be the law of the land.

STATEMENT

At the March 20th, 1984 Hearing of the Senate Judiciary Subcommittee on the Constitution, on "The impact of the Equal Rights Amendment upon Social Security Programs", the statement was made several times that we did not need to have an Equal Rights Amendment because the Senators and Congressmen were "making a good faith effort" to remove the inequities which exist. The recent vote on the bill to provide equal pensions for women casts doubt upon the "good faith effort". However, many senators and representatives have indeed worked hard in a good faith effort to pass the ERA in this country to provide equity for women and to make sure women are equal before the law, but it is clear that the good faith of those members has not been sufficient to overcome the reluctance of those who have voted against equality. Precisely because the efforts for equality rest on the "good faith" of the present and future members, which may in fact not exist now or in the future, the Constitutional change is necessary. The Amendment does not specify the changes which have to be made. Rather it sets the goal and makes efforts to reach that goal mandatory rather than "good faith".

This reason for passage of the Equal Rights Amendment was not made in the Hearing and therefore the statement is necessary for the record.

Margaret Feldman, Ph.D.
Professor, Retired

THE IMPACT OF THE EQUAL RIGHTS AMENDMENT: DEFINING DISCRIMINATION

MONDAY, APRIL 23, 1984

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:33 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senator Thurmond.

Staff present: Stephen J. Markman, chief counsel and staff director; Dick Bowman, counsel; Randall R. Rader, general counsel; Carol Epps, chief clerk, and Leslie Leap, clerk.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. Ladies and gentlemen, today's hearing marks the seventh day of hearings by the Subcommittee on the Constitution on the meaning of the proposed equal rights amendment to the Constitution. In the process, I believe that we are creating the most thorough and comprehensive legislative history ever created on the real world impact of the ERA.

As I have consistently observed during these hearings, I believe that such a record will enable Members of Congress and State legislators, if the ERA progresses that far, to cast a more intelligent and better-informed vote on the proposed 27th amendment to the U.S. Constitution.

Today's hearing will focus on one of the most substantial issues involved with the ERA: How is discrimination going to be defined under the proposed amendment? Will it be defined in the traditional constitutional manner, by an inquiry into the intent or purpose or motivation of an alleged sex discriminator, or will it be defined through a statistical analysis of the disparate impact upon men and women of an allegedly discriminatory activity?

Although this may seem a dryly academic issue to many, in reality it is perhaps the most significant constitutional issue surrounding the proposed amendment. Indeed, it is perhaps the most significant issue extant in civil rights law generally today and was at the center of recent controversy in both the debate over amendments to the Fair Housing Act and the Voting Rights Act.

In addition to pursuing the proper standard of defining discrimination under the equal rights amendment, we also hope today to explore some of the policy implications involved in adopting one or the other standard.

Assisting us in our inquiry today will be two individuals who have carefully studied this matter. As in each of our earlier hearings, we have attempted to achieve a balance between individuals supportive of the ERA and those who are critical of it.

Our witnesses this morning will be Prof. Judith Wegner, of the University of North Carolina Law School and Prof. Edward Erler, now on leave with the National Endowment for the Humanities.

We appreciate our witnesses being here with us today and look forward to taking their testimony.

I would also observe that one of our originally scheduled witnesses, Commissioner Mary Berry of the U.S. Commission on Civil Rights, is not here because of a late and abrupt cancellation. We invited Professor Berry and looked forward to having her testimony, but she has canceled at the last minute. We feel sorry about that, but we are very happy to have Professor Wegner with us.

We will call both of you to the witness table, then, Prof. Judith W. Wegner, of the University of North Carolina School of Law, and Prof. Edward Erler, of the National Endowment for the Humanities.

Professor Wegner, we will have you go first, and then, Professor Erler, we will hear from you.

Welcome to the committee. We are glad to have you here. We appreciate the effort you have put forth, and we look forward to taking your testimony.

STATEMENTS OF A PANEL, INCLUDING PROF. JUDITH WELCH WEGNER, UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW; AND PROF. EDWARD J. ERLER, NATIONAL ENDOWMENT FOR THE HUMANITIES.

Professor **Wegner**. Thank you, Senator.

Let me briefly introduce myself. As you said, I am Prof. Judith Welch Wegner from the University of North Carolina Law School. I am drawing in this presentation upon some work I had done in studying section 504 of the Rehabilitation Act, which applies to handicap discrimination. In that work, I studied in particular the question of disparate impact and the need for discriminatory intent.

I would like to thank the committee for allowing me to appear here today. I would say to begin that I strongly endorse the ERA. I believe that it embodies a very important principle of equality, and that indeed, we should continue to press for its adoption.

Although we have made great strides in the last few years toward ensuring equality of opportunity for women, I think we still need the ERA in order to ensure the permanence of those strides. I think in addition, that incorporation of a disparate impact standard would give us a broader range of protection, and therefore support the interpretation of the ERA to incorporate a disparate impact standard, the particular point which we are discussing today.

Senator **Hatch**. Could you explain for our audience here today what you mean by disparate impact?

Professor **WEGNER**. Yes, Senator. I mean by disparate impact, a situation in which a facially neutral classification, legislative or otherwise, creates a disadvantaged class which includes a disproportionately high number of persons of one gender, or which allocates to members of a disadvantaged class disproportionately heavy burdens related to their gender.

I would like to make four points, if I might. First, I would like to describe the current situation under the equal protection clause, if the committee would like that, explaining why it is that disparate impact has not been adopted by the Supreme Court under the equal protection clause as a basis for ensuring protection against classifications based on race. Then, I would like to go on and explain why I think the ERA could be interpreted to include a disparate impact standard, although the equal protection clause has not been so interpreted. Third, I would like to look at four hypothetical cases which I think will illustrate the application of the disparate impact standard. Finally, I would respond to any questions the committee might have.

First, as I am sure the Senator is aware, the equal protection clause has been interpreted by the Supreme Court to require differing levels of scrutiny depending on the class that is affected. The rational basis test, which involves minimal scrutiny, has been used for most legislative classifications; in such cases, a mere rational basis is sufficient to justify a challenged classification.

In the case of a gender-based classification, the Supreme Court has adopted a middle tier of analysis. In such cases, an important state interest must be shown, and a substantial and fair relationship between that interest and the means adopted must be demonstrated in order to justify use of a gender-based classification scheme.

Finally, the Supreme Court has adopted a strict scrutiny test requiring demonstration of a compelling State interest in order to justify reliance upon a suspect classification scheme, such as one which discriminates against a particular class on account of race.

The Supreme Court has held, however, that such enhanced scrutiny as I have described with respect to gender and race applies only where purposeful discrimination is involved. That commonly would be found where there is a demonstration of facial discrimination in the statute, but the Supreme Court has indicated that intentional discrimination could otherwise be found based in part on disparate impact and other factors such as administrative or legislative history of intentional discrimination. However, the Court has found, for example, in the *Feeney* case, with involving veterans' preference which I am sure you are familiar, that disparate impact alone is not enough to trigger this enhanced scrutiny in the area of gender discrimination. Neither will disparate impact without more trigger enhanced scrutiny in the area of race discrimination as was held in the *Washington* v. *Davis* case.

Therefore, I think we could agree that if a discriminatory intent standard is adopted in interpreting the ERA, a comparatively narrow class of cases would be covered and would require enhanced scrutiny under that amendment.

I believe that the ERA could be interpreted either to incorporate a discriminatory intent standard or a disparate impact standard.

Although the equal protection clause has been found by the Court to require a discriminatory intent standard, there nevertheless is some basis for thinking that the Court could adopt a broader view with respect to the equal rights amendment.

I think this for several reasons. Although the language of the amendment is in many respects similar to the equal protection clause of the 14th amendment, we have distinct legislative history with respect to the ERA. I think that the Court could interpret the ERA, as designed to reach a broader class of situations, including those involving disparate impact, and to overrule cases, such as *Feeney*, which had failed to afford relief under the 14th amendment to disadvantaged gender-based classes in the absence of acceptable proof of discrimination intent.

I think, in addition, that there is some evidence in the legislative history, in particular, in view of the heavy reliance on the Emerson and other Yale Law Journal articles, with which I suspect the Senator is familiar, which indicates that Congress had envisioned use of a discriminatory impact standard under the ERA. I, therefore, think that it is very important, and I commend the committee for having special hearings on this subject to clarify the issue in the event that the question would arise in later litigation under the equal rights amendment.

Senator HATCH. Thank you.

Professor WEGNER. Now, I think that perhaps the best way to understand how this question should be resolved—and as I say, I strongly endorse the use of a discriminatory impact standard—would be to look at four examples of situations in which this issue might come up and then talk about what seems to be an appropriate resolution. Because I favor the resolutions in these cases, I, therefore, endorse the broad position that a disparate impact standard should be adopted.

I would suggest that an initial question which arises in each of these examples is what standard of scrutiny the courts would generally apply in analyzing classifications which result in disparate gender-based effects. As I have described to you, there are several choices under the existing equal protection analysis.

I have stated in my written testimony that I believe that the intermediate level of scrutiny—that is the *Craig* v. *Boren*, important State interest substantial relationship to the means adopted standard—would very likely, or could possibly be adopted by the courts in reviewing cases involving facially neutral classifications which result in disparate, adverse gender-based effects. I think this is an appropriate standard for several reasons. I think it is warranted because it honors the Government's interest in using facially neutral classifications, and indeed, it seems to me appropriate that a lesser level of justification would be applied when we are talking about facially neutral standards which are not purposefully discriminatory, under current 14th amendment analysis, than if we were talking about classifications that discriminate on their face.

I think, in addition, that this middle level of scrutiny allows us to get to the heart of the matter. Facially neutral classifications are most often problematic in that they may be overly broad or overly narrow means of achieving governmental objections in a way that severely disadvantages women. The middle level *Craig* v.

Boren test allows careful inquiry concerning the fit between important governmental interests and the means employed to achieve those interests, precisely the difficulty with many facially neutral classifications having disproportionate adverse gender-based effect. This standard could assist reviewing courts to get to the crux of the problem caused by such classifications without causing great fear about striking down every such classification, as might be the case if a compelling State interest test were employed. As the Senator may know, even such people as Solicitor General Lee has endorsed this standard in his book on the ERA, and has suggested that this is a wholly appropriate standard. It is one that we are living with now under the equal protection clause as it applies to intentional gender-based discrimination.

Let me, then, turn to four hypotheticals. The first one involves veterans' preference, the second, employee height and weight requirements, the third, prostitution, and the fourth, social benefits schemes such as disability insurance or AFDC benefits.

First, as to veterans' preference—I will not touch on this in too much detail, since I understand you have already had, or contemplate, hearings on this point—the initial question for analysis would be whether there is a substantial adverse impact upon women in an instance in which a State or Federal Government had adopted one or another veterans' preference scheme.

I think that this is probably so at the moment, or was, at the time of the *Feeney* decision. As we all know, however, there are changes going on in the military at this point, and if this question were litigated at some future time, it might be that the degree of disparity would have been substantially reduced, and that is a point that I would raise initially.

Assuming, however, that there could be shown to be a substantial disparate impact, our next question would be whether there is an adequate justification for the scheme nevertheless.

The Court in *Feeney* recognized that there are several State interests served by a veterans' preference scheme, including a desire to reward persons who have served in the military, a need to try to ease their transition back into civilian life, and a need to ensure disciplined and capable persons in the State civil service. I think all those purposes are likely to be found to be important State purposes. I think the problem arises when we get to the fit, the question of whether the means adopted would in fact serve those ends no more broadly than necessary. I suspect that an absolute preference such as was litigated in *Feeney* would raise questions in that regard, but as even the dissent in that case acknowledged, a more temporary limited-term sort of preference that would be geared very narrowly and specifically to easing people's transition back into civilian life might well be sustained.

Second, as to the height and weight question, this area has been addressed in substantial degree under title VII of the Civil Rights Act of 1964. I think that, nevertheless, it is important to have this question addressed under the Constitution as well, to ensure that there be permanence of protection in this respect.

The Supreme Court has indicated, for example, in the *Dothard* v. *Rawlinson* case involving prison guards and height and weight restrictions applicable to those employees, that there could in fact be sustained an employee screening criterion that is geared to strength, if it were testing strength directly. However, a height or weight requirement which is only looking to that height or weight along, and not to the ultimate job-related issue which would be strength would not be upheld. I think the same could be said, for example, as to requirements in the military, that if there were, in fact, a demonstration that strength was required, that is, that strength was, in fact, a job-related requirement that was needed in order to perform the functions required on the job, then a strength criterion would be sustained. The problem would come if you used an inappropriately broad proxy for that characteristic, such as height or weight, which is not directly testing strength. I think, however, that the Court would uphold something that was designed to test strength directly.

Third, I would take the example of prostitution. This is a unique problem, I think, unlike other criminal laws which may, in their own right, affect a disproportionate number of men or women. I think one of the cases I had cited in my written statement said that because many criminal laws are violated, perhaps, by a higher proportion of men than women, the Court feared that all criminal laws might be jeopardized by the adoption of a disparate impact standard. It accordingly rejected a disparate impact standard and upheld a prostitution statute which had a disproportionately adverse effect on women.

I would suggest that the problem with prostitution statutes is really much narrower and more unique than the Court in the case recognized. The problem in the prostitution context is the fact that prostitutes themselves are penalized, and that is a class that is more commonly comprised of a substantially disproportionate number of women, whereas patrons of prostitutes, which in turn are composed more commonly of a substantial disproportion of men, are not penalized.

I think the Court would look at such a scheme in which a State had a facially neutral statute applicable to prostitution, but none prohibiting the conduct of the client of the prostitute, that is, the hirer of the services in question, and would apply the *Craig* v. *Boren* test. I think if that test were applied, we would run into substantially more questions than we have to date where the rational basis test has been applied. This is because, unlike situations in which, for example, statutory rape statutes have been litigated, we have a question of why there has not been the added deterrent of criminalization of the conduct of the prostitute's patron or client, since really, in a consensual sex act situation, it would seem that both parties are equally involved in and equally in need of deterence from the conduct which the State seeks to prohibit or regulate. In short, a statutory scheme which only penalized prostitutes and not clients might well be deemed to be overly-narrow and to fail the *Craig* v. *Boren* requirement of a close and careful fit between Government ends and the means employed.

Finally, I will turn to the question of benefits, AFDC benefits or disability insurance, something of that sort, similar to what we saw in *Geduldig* v. *Aiello*, I think that there has commonly been a question of proof, whether there is, in fact, demonstrated to be a disproportionate impact upon a class such as women, so that, as an initial matter, would have to be surmounted. Beyond that, however, we get to the question of justification. In the situation in which a disability insurance scheme might be attacked, the Court in *Geduldig*, for example, has said that it was appropriate for the State of California to maintain a scheme which was geared to the capacity of employees in the State to pay a mandatory fee. I think that if the need for similarly limited fees could continue to be shown, there might be some question whether there would be any change in results from that in *Geduldig*. Assuming, however that it could be shown that there was more capacity to, perhaps, enlarge the services provided in some way, I think the question then would be whether there were some neutral standards being applied in selecting which of several types of disability would, in fact, be covered. If, for example, cost, number of persons served, degree of severity of disability, things like that, were in fact being used across the board as means for selecting which types of disability were covered by the scheme, I think that conceivably a scheme might still be sustained in which that pregnancies would not be covered. But I suspect that since pregnancy is something that affects so very many women, resulting in a great need for coverage, it well might be that a situation such as *Geduldig* would come to another result under a disparate impact standard.

Lastly, as far as AFDC benefits are concerned or something of that sort, which may severely affect women in light of the increasing feminization of poverty, I suspect that a court would be very wary to set aside any legislative judgment determining which of several possible groups was most needy in light of the scarce and limited public resources entailed. I have cited in my written testimony examples under title VI of the Civil Rights Act and under section 504 of the Rehabilitation Act, which makes me feel quite clearly that a court would hesitate to second-guess the congressional or State legislative judgment concerning the allocation of benefits out of a limited public purse.

Those are the four hypotheticals, Senator. I would conclude that these results that I have described would occur in the event a disparate impact standard were applied would in fact provide important additional protection for women. I think that disparate impact is as much a problem as discriminatory intent, in that the result is the same and the injury to the protected class is the same. It is very important to assure that governmental actions that would severely affect a protected class under some scheme of equal protection and equal rights, such as that that we are talking about here, be truly evenhanded, reflecting careful tailoring of the class chosen to meet these proper governmental ends. I think that if that careful tailoring were done, legislative schemes or other classifications would be upheld, but that it would be fair and reasonable to expect that such classifications would be given a careful look in situations in which a substantial disparate impact is created.

Thank you again for allowing me to appear here.

Senator HATCH. Thank you, Professor Wegner.

[The following was received for the record:]

TESTIMONY OF PROFESSOR JUDITH WELCH WEGNER,
UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW,
BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION
SENATE JUDICIARY COMMITTEE

April 23, 1984

I appreciate the opportunity to appear before the Subcommittee this morning to discuss what we all agree to be a very important question, the role of discriminatory intent and discriminatory impact in interpretation of the Equal Rights Amendment. I commend the Subcommittee for its efforts to develop a legislative history that will aid the courts, in the future, in addressing this critical issue. I hope that my comments will be of assistance.

To begin, I should briefly introduce myself. I am currently an assistant professor of law at the University of North Carolina. I have recently completed an extensive study of section 504 of the Rehabilitation Act of 1973, one of the major federal statutes which prohibit discrimination against handicapped persons. In the course of that study, I considered the extent to which constitutional and statutory race and sex discrimination analysis provides analogies helpful in resolving problems of handicap discrimination. Among the specific questions I addressed were whether section 504 incorporated a discriminatory impact standard, and how that standard should be interpreted. In presenting my testimony today, I will draw upon this background, as well as upon my general background in constitutional law and civil rights legislation, which includes past service as an attorney-adviser in the Office of Legal Counsel, United States Department of Justice; as Special Assistant to then Secretary of Education Shirley M. Hufstedler; and as federal court law clerk following my graduation from UCLA School of Law.

I will touch on four basic points. First, I will explain why I believe the discriminatory intent/discriminatory impact issue is an important one. Second, I will explore the reasons why I believe the Equal Rights Amendment might be interpreted to embody a discriminatory impact standard, notwithstanding the fact that the Equal Protection Clause is currently understood to incorporate a narrower, discriminatory intent requirement as a prerequisite for application of enhanced judicial scrutiny. Third, on the assumption that a discriminatory impact standard has or may be incorporated into the ERA, I will discuss how that standard may be interpreted. Finally, I will explain why I believe adoption of a discriminatory impact standard is warranted.

The discriminatory intent/discriminatory impact issue is important because of its critical bearing on the breadth of application of the ERA. The Equal Protection Clause is currently interpreted to require that states justify intentional reliance on discriminatory gender-based classifications by demonstrating that such classifications bear a fair and substantial relationship to important state ends. See, e.g., Craig v. Boren, 429 U.S. 190, 197 (1976). This standard thus falls mid-way between the "rational basis" test applied to most legislative classifications, and the "compelling state interest" standard used to invalidate suspect classifications such as those based on race. In practice, the intermediate level test that is applied to legislation involving intentional discrimination on the basis of gender requires a state to ensure a reasonably close fit between its objectives and the means chosen for their implementation. If it does so, the governmental action will be sustained. See, e.g., Heckler v. Mathews, 104 S.Ct. 1387 (1984) (upholding temporary gender-based exemption from pension offset requirement which limited amount of spousal benefits available under Social Security Act).

The Supreme Court has acknowledged that discriminatory intent, needed to trigger such enhanced scrutiny, may be demonstrated by reference to a variety of factors, including discriminatory impact (that is inclusion of a disproportionately high number of traditionally disadvantaged persons in the challenged class, or allocation to such persons of disproportionately heavy burdens). See, e.g., Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979). Notwithstanding this acknowledgement, in cases in which facially neutral classifications have resulted in undeniably severe adverse impacts on women, the high Court has concluded that no discriminatory intent has been shown and has accordingly required no more than a minimal justification under the rational basis test. See, e.g., Personnel Administrator v. Feeney, 442 U.S. 256 (upholding Massachusetts' use of veterans preference in operation of state civil service system); Geduldig v. Aiello, 417 U.S. 484 (1974 (upholding California's policy of excluding pregnancy benefits from coverage of state disability insurance program). If the ERA is interpreted to require not only an increased level of justification to sustain use of gender-based classifications, but also to mandate the application of some level of enhanced scrutiny to a broader range of cases --including both those in which states employ facially discriminatory classifications and those which involve equally injurious, facially neutral classifications which substantially disadvantage women --it would provide a significantly expanded zone of protection, extending beyond that currently provided under the Fourteenth Amendment.

I believe the ERA may be interpreted as embodying such an expanded zone of protection. As the record now stands, a court asked to determine whether the ERA embodies a discriminatory intent or discriminatory impact standard would be faced with divided evidence. On the one hand, a narrow discriminatory intent interpretation could be supported by the similarities between the language of the ERA and that of the Equal Protection Clause; and by suggestions in the ERA's legislative history to date that the ERA is intended to ensure that gender-based classifications are precluded to the same extent as are racial classifications under the Equal Protection Clause (thus, incorporating the current discriminatory intent standard which has been applied in that context). On the other hand, however, a court could be expected to interpret the new constitutional language in light of its own legislative history. See, e.g., Brown v. Board of Education, 347 U.S. 483 (1954). That history reveals a broad remedial purpose, as well as an expectation that facially neutral classifications having substantially disparate impacts would be subject to enhanced scrutiny. Thus, for example, during the 1970-72 debates on the ERA, members of Congress placed heavy reliance upon the interpretation afforded the Amendment by Brown, Emerson, Falk and Freedman in their leading article on the ERA, "The Equal Rights Amendment: a Constitutional Basis for Equal Rights for Women," 80 Yale L.J. 871 (1971). That article specifically discussed and contemplated the incorporation of a disparate impact standard. Id. at 896-900. In recent discussions of the Amendment as reintroduced during the 98th Congress, members expressed the view that the new constitutional text could be interpreted as overruling the Feeney decision's legitimation of the Massachusetts veterans preference system, a decision which heavily rested on the Supreme Court's refusal to adopt a disparate impact standard. In light of this divided evidence, it is particularly important that this Committee develop a clear legislative history to guide the courts' interpretation on this point.

Assuming that a disparate impact standard is found to be incorporated into the ERA, important questions of interpretation would undoubtedly be presented. Let me touch on four hypothetical cases to sketch how this broader standard might be applied.

First, the veterans' preference policy at issue in the Feeney case might be reexamined. The Massachusetts policy challenged in that case provided for an absolute lifetime preference for veterans. The Supreme Court upheld that policy using a minimal rational basis test. The state's asserted justifications for retention of the preference system -- the need to reward veterans for the sacrifices implicit in military service, the desire to ease their transition to civilian life, and the state's need to attract loyal and well-disciplined persons into its civil service -- were found to be legitimate ones, which provided sufficient justification for the system's retention, notwithstanding its admittedly severe impact on women who had been accorded opportunity to enroll in the armed services.

A contrary result would likely be reached under the ERA if that Amendment were interpreted to incorporate a disparate impact standard. A two step analysis would be required. First it would be necessary to determine whether the facially-neutral preference for veterans results in a prima facie denial of equal rights because of sex. The evidence in Feeney indicated that a substantially higher proportion of women than men fell within the class of nonveterans disadvantaged by the Massachusetts preference policy. At least two members of the Supreme Court believed that the demonstrated statistical imbalance was insufficient to warrant the conclusion that the classification was gender-based, however. 442 U.S. at 281. A greater number might reach such a conclusion in view of more recent figures reflecting an increased proportion of female veterans as the armed services have become more integrated.

Assuming, however, that a threshold showing of substantial gender-based disparate impact could be made, a second analytical step would be required, an assessment of the state's proposed justifications for its actions. A court would be required, at this stage, to determine whether strict scrutiny, using the compelling state interest standard, or intermediate scrutiny, using the Craig v. Boren "substantial relationship to important state ends" standard, should apply to facially neutral classifications of the sort at issue here. It is by no means clear that a strict compelling state interest standard would be applied by the courts, under the ERA, in evaluating facially-neutral classifications having gender-based disparate effects. The intermediate Craig v. Boren standard would have much instead to commend it. It would function in this context much as it has, when currently employed under the Equal Protection Clause. It would allow a court to preserve classifications based on important governmental interests, where implemented by means narrowly tailored to those ends. On the other hand, it would limit the use of facially-neutral classifications which result in significant discrimination that it unnecessary and avoidable. The courts would very likely be drawn to this intermediate standard as a practical means for working necessary compromises between these substantial competing interests: The need for government to accomplish a variety of ends through facially-neutral classifications, and the need for women to be protected against substantial resulting burdens demonstrably linked to gender. Indeed, Congress, through the Amendment's legislative history, could indicate its intent that the ERA be interpreted in this fashion.

Even under this intermediate standard, however, the veteran's preference policy at issue in Feeney would very likely fall. Although the cited state interests in rewarding veterans, aiding reentry into the civilian population, and ensuring an effective civil service may be important ones, the preference system itself can be attacked as poorly tailored to serve those ends. See 442 U.S. at 282-89 (Marshall and Brennan, JJ, dissenting). A more limited preference carefully geared to fostering reentry into civilian life immediately upon discharge from the service might, however, surmount such a challenge assuming the application of this intermediate tier standard.

Second, a challenge might be raised against height, weight, or other similar facially neutral employment criteria which tend to discriminate against women. Once again, a threshold showing of significant disparate impact would be required. Once again, that showing could very likely be made, at least where certain height and weight requirements are concerned. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 329-30 (1977) (5'2" height limitation excludes 33.29% of women but only 1.28% of men). For reasons noted above, an intermediate tier standard of justification might be applied at the justification stage. This "substantial relationship to an important state interest" standard closely resembles the requirement under Title VII of the Civil Rights Act of 1964 that facially neutral employment criteria which have significant gender-based disparate impacts be justified as substantially related to business necessity, that is, to job performance. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Applying this standard, the Supreme Court, in Dothard v. Rawlinson, struck down certain height and weight requirements which adversely affected women applying for positions at prison guards, but observed that a carefully-tailored strength standard would be upheld. 433 U.S. at 332. Even if a more stringent strict scrutiny standard were applied, a similar result would very likely obtain.

Third, the validity of prostitution laws may be called into question. Criminal codes in many states penalize prostitution by both men and women, yet fail to penalize the closely related conduct of the prostitute's patron. While such a statutory scheme appears on its face to be gender-neutral, in fact a disproportionately high number of persons arrested for prostitution have been women. The class of patrons who are not penalized is therefore likely to contain a disproportionately high number of men.

There is clear precedent for upholding such a statutory scheme in the event that minimal scrutiny is applied. The Supreme Judicial Court of Massachusetts upheld similar state legislation against state and federal constitutional challenge in Commissioner v. King, 372 N.E.2d 196 (Mass. 1977). Although recognizing that the state ERA required application of a compelling state interest test to gender-based classifications, the court dismissed as "unconvincing" the argument that discrimination exists because most prostitutes are women and most customers men. 372 N.E.2d at 204 n.10. Increased scrutiny was therefore not triggered. Similarly, in Smith v. Keaton, the North Carolina Supreme Court rejected the argument that municipal prohibition of cross-sexual massage violated equal protection principles, in view of the fact that the law was uniformly applied to male and female providers of massage services. 285 Va. 530, 206 S.E. 2d 203 (1974). The United States Supreme Court dismissed for want of a substantial federal question. 419 U.S. 1043 (1974).

Neither King nor Smith fully addressed the application of the disparate impact theory to the facts at hand. A court applying that theory in a careful fashion is likely to conclude, based on available data, that a statutory scheme which penalizes providers, but not patrons, bears more heavily on women than men. Turning to the second step of analysis, the court would have to consider whether the scheme is justified under at least the intermediate level Craig v. Boren standard. It would be quite likely to find an important state interest in the state's asserted concern for the health and safety of its citizens. A problem would more likely arise, however, as a result of the poor fit between that objective and the means employed. Penalizing providers but not patrons is not justified in the interest of deterrence; indeed, underinclusion is likely to reduce the statutory scheme's deterrent effect. This situation must therefore be distinguished from that in Michael M. v. Superior Court of Sonoma County, in which the United States Supreme Court upheld a California statutory rape provision which penalized only a male perpetrator and not his female partner. 450 U.S. 464 (1981). In that case, the statute's underinclusiveness was justified by the fact that women bear the risk of pregnancy, a deterring factor in and of itself, and by the possibility that penalizing the female partner could deter female victims from reporting statutory violations. Here, in contrast, these same considerations would appear to justify penalizing the patron rather than the provider.

While the result is by no means clear, in view of traditional deference to state judgments concerning the appropriate scope of exercises of the police power, prostitution statutes of the sort described are nevertheless more susceptible to challenge under an ERA which embodies a disparate impact standard than otherwise. Assuming a successful challenge, however, a court would likely invoke canons of construction calling for strict interpretation of criminal laws, and decline to extend criminal penalties to the class of patrons, while striking down a narrow prohibition on prostitution itself.

The fourth and final hypothetical is perhaps the most troublesome. Decisions to deny certain types or levels of social services may have a disparate impact upon women. For example, California's decision to exclude coverage of pregnancy from the scope of its disability insurance program, at issue in Geduldig v. Aiello, 417 U.S. 484, necessarily had a severe adverse effect on women, who constitute the greater number of "nonpregnant persons" likely to benefit from such coverage. Cutbacks in AFDC benefits, found to have a particularly severe impact on members of minority groups in Jefferson v. Hackney, 406 U.S. 535 (1972), might similarly be seen to affect women disproportionately, in view of the increasing feminization of poverty. A decision to fund old age or disability benefits, in preference to families with dependent children, might therefore be challenged under an ERA which incorporated a disparate impact standard.

Assuming that a significant disparate impact could be shown, the question again arises whether the challenged state action can be justified. Justifications, in cases such as these, are likely to be rooted in the scarcity of public resources. The courts have had limited experience in evaluating such justifications in situations in which enhanced scrutiny must be applied. It is clear that facially discriminatory policies cannot survive an intermediate level of scrutiny where resting simply upon limited excess costs of administering a gender-neutral system of service allocation. See, e.g., Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980). Harder questions are posed, however, when the challenged action is justified by the inevitable need to allocate scarce resources among competing claimants, all of whom receive at least some benefits, rather than by the limited marginal costs of gender-neutral administration.

Perhaps the best guidance concerning the likely resolution in resource allocation cases of the latter type can be drawn from analogous decisions under federal civil rights law. Such cases have generally accepted governmental justifications for resource allocation decisions adversely affecting members of the protected class, after some effort to evaluate the availability of less discriminatory alternatives. Thus, for example, in NAACP v. Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981), the court rejected a challenge under Title VI of the 1964 Civil Rights Act and upheld a decision to relocate urban medical facilities to a suburban site, notwithstanding the adverse impact upon inner-city minority populations. Moreover, in Jennings v. Alexander, 715 F.2d 1036 (6th Cir. 1983), cert. granted, 52 U.S.L.W. 3610 (Feb. 21, 1984), a Tennessee decision to limit the duration of coverage for inpatient hospital care was upheld in the fact of a challenge under section 504 of the Rehabilitation Act of 1973, notwithstanding the disproportionately severe impact of that decision upon handicapped users who, in many cases, required longer periods of hospitalization. These cases suggest that the courts will continue, under a disparate impact standard, to demonstrate sensitivity to legislative resource-allocation decisions, but that they may expect, in return, sensitive consideration of decisions which result in unequal allocation of opportunities based on gender.

It is always difficult to predict the course of future litigation. I suspect, however, that were Geduldig to be retried following the passage of the ERA, the state disability insurance system might well again be upheld if it could be shown that the system's very viability was at stake in the event an alternative plan of coverage, including pregnancy, were provided. In the absence of such evidence, a state's policy of excluding pregnancy benefits from the coverage of an employee insurance program might well fall. A court could be expected to note the particularly severe impact such an exclusion has on women, to consider any gender-neutral policies used in determining the scope of coverage (such as numbers of persons who suffer from a particular disability, its severity, costs of coverage, and so on), and to weigh heavily state efforts to maintain a balanced program of coverage which best meets the needs of all participants. While a decision to limit the extent of pregnancy-related benefits would likely survive such analysis, an outright refusal to provide any pregnancy-related benefits might well not. On the other hand, a decision to limit the level of AFDC benefits, as in Jefferson v. Hackney, would likely survive constitutional challenge if based on considered, gender-neutral judgments concerning the level of need experienced by competing claimants for social service benefits.

Consideration of these hypothetical cases suggests that interpretation of the Equal Rights Amendment to include a disparate impact, rather than discriminatory intent standard would provide important additional protection against gender-based discrimination without unduly compromising important competing government interests. Based on this analysis, I strongly recommend that the Committee go on record as supporting such an interpretation. Although I recognize that this approach would accord greater constitutional protection against gender-based discrimination than is currently afforded other types of discrimination under the Equal Protection Clause, I believe that this added protection is warranted in view of the social problems the ERA is designed to correct.

I thank the Subcommittee for this opportunity to express my views, and for its efforts to ensure speedy passage of this highly significant and long-awaited amendment.

Senator **Hatch**. Let us turn to you, Professor Erler, and take your statement, and then we will have some questions for both of you.

STATMENT OF EDWARD J. ERLER

Professor **Erler**. Thank you.

Mr. Chairman, I am honored to be here at the invitation of this committee. I appear as the representative of no group, but merely as a private citizen who has an abiding interest in the perpetuation of constitutional government.

I believe that any attempt to amend the Constitution must be approached with the utmost gravity. The alteration of the fundamental law was described by the framers as a most solemn and authoritative act. The burden of proof, therefore, must rest with those who propose to change the organic law of the Nation to demonstrate that the changes are both necessary and certain to produce salutary effects.

It is my considered view that the supporters of the equal rights amendment have failed to carry the burden. The ERA is cast in vague and imprecise language. The amendment, if passed, would be the first that sought to protect rights that it does not specify or define. It refers merely to equality of rights. I think that imprecise language of this kind is hardly suitable for inclusion in the text of the Constitution.

But the most important unresolved question involving the ERA is, I think, the standard of constitutional construction that it will require. Most proponents indicate that the ERA will require a suspect classifications test, the test that the court has devised over the years to test classifications based on race, religion, and national origin. This is a very exacting standard, and virtually no laws can survive this test if they classify on the basis of race or religion. It must be presumed that no laws based on gender would survive if this test were adopted under the ERA.

Professor Emerson, in his House testimony, was one of those who said that "A complete bar against classifications by race has, for all practical purposes, been applied in race discrimination cases. It is equally necessary to secure gender equality." And Professor Emerson further defines gender equality as "the prohibition of any differentiation in legal treatment on the basis of sex."

Currently, as Professor Wegner explained in her testimony the court uses a somewhat less exacting test for gender classifications, one which is nevertheless, I believe, quite stringent. Gender classifications must serve an important governmental interest and be substantially related to the accomplishment of that interest. The test requires, as the court has recently said, "an exceedingly persuasive argument" to justify the use of gender classification. Not many laws classifying on the basis of gender survive even this so-called middle-tier test. But this test is said by most proponents of ERA, and Professor Wegner seems to be somewhat of an exception, to be inadequate. In addition to strict scrutiny, its proponents argue that the ERA will require a disproportionate impact test, or a disparate impact test. Under this test any law, although neutral on its face, which has a disproportionate impact on women, will come under strict scrutiny. Under current 14th amendment standards, disproportionate impact, in and of itself, is not sufficient for establishing a claim of discrimination. In order to establish a claim of discrimination, there must be a showing of discriminatory purpose or intent. This purpose does not have to be expressed on the face of the law, but can be inferred from the totality of the circumstances, including the fact that the law in question has an adversely disproportionate impact.

Under ERA, disproportionate impact would be, not inferential evidence, but dispositive evidence, of discrimination. This would be a radical departure from present-day standards and would work to disallow laws that have a disproportionate impact on women, but which cannot be traced to a discriminatory purpose. The range of laws involved here would be extensive, including veterans' preference laws, laws against prostitution, laws providing social services, welfare, Social Security, and laws bearing upon a host of economic issues.

Disparate impact analysis currently exists under title VII, as Professor Wegner has pointed out. A showing that hiring practices have resulted in disproportionately fewer females being hired creates a prima facie case of discrimination. This places the burden on the employer to demonstrate that the disproportion did not result from an intention to discriminate. This defense is, in turn, subject to challenge by the complaining party. But as the court remarked in *Texas Department of Community Affairs* v. *Burdine,* "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."

Evidence of disproportionate impact is given greater weight under title VII than under the 14th amendment. But title VII is a narrowly drawn statute, aimed at preventing gender discrimination in employment. The analysis required by title VII would be, in my opinion, inappropriate to the more extensive reach of the 14th amendment or to the equal rights amendment.

But most proponents of ERA claim that it would require a more rigorous test of gender discrimination than title VII. Title VII does not require strict scrutiny, since it is possible to rebut the prima facie claim of discrimination by articulating some legitimate, nondiscriminatory reason for the disparate impact. The standard of discrimination established by ERA would be more radical and more extensive than that required by title VII.

Prof. Ann Friedman, for example, who is a leading theoretician of the equal rights amendment, remarks that, "Strict judicial scrutiny under the ERA would be required of a neutral rule that has a disparate impact on members of one sex or perpetuates discriminatory patterns similar to those associated with facial discrimination."

In other words, if there was a disproportionate impact that resulted from the operation of a law, many of the proponents of the equal rights amendment claim this would trigger the strict scrutiny test. As we know, of course, strict scrutiny is a very difficult test, one which laws rarely survive—in fact, I think that the last time a racial classification survived under the strict scrutiny test was the *Korematsu* case in 1944, which approved the Japanese exclusion orders.

Advocates of ERA would thus establish a more exacting test of gender classification than the one that would be required for racial classification.

Under the 14th amendment, the necessity of tracing an allegedly discriminatory law to a discriminatory purpose on the part of the lawmaker would remain, whereas it would not be required under ERA. This would indeed be ironic, since it can hardly be said that women have sustained the same assaults upon their rights as have certain racial groups. Women have had no affront to their rights and dignity equivalent to the *Dred Scott* decision, the decision that held that blacks could never be citizens of the United States, nor were there any rights belonging to blacks that the whites were bound to respect.

Women as a class have never been chattel slaves, nor have they been subjected to the same hostile legislation as blacks. The court decisions that the proponents of ERA complained most vociferously about were ones that, by and large, were intended—however misplaced the intentions might have been—to benefit and protect women. I find it impossible to imagine any racial classification that could serve a legitimate purpose in constitutional government, although I can think of many gender classifications that could. Race is simply not analagous to gender from the point of view of determining what is required for the protection of equal rights.

I believe the proponents of ERA admit the inapposite comparison between race and gender when they argue that there will be certain exceptions to the strict scrutiny rule. The exceptions would be those based upon unique physical characteristics, and those involving benign quotas benefiting the class interests of women. I think that this indicates that the argument about ERA is no longer an argument about equal rights, but an argument about equal results. Under ERA, proportionality will necessarily be the test of gender discrimination.

The California Commission on the Status of Women, for example, remarked in its report that, "The touchstone of the ERA will be totally 50-50 sharing of every occupation."

I do not think that proportionality can effectively be a test of individual rights, and it will not indeed be a test of individual rights, but a test of how an individual fares as a member of a class. It is not a standard that looks forward to the protection of equal rights, but one which is determined to guarantee equal results, and as I think everyone knows, the two are not the same.

I do not think that the citizens of America relish the idea of a proportional society where one's rights are conditioned by the class that one inhabits, whether it be a racial class, a religious class, or a gender class. I believe the disproportionate impact standard resurrects the old "separate but equal" doctrine under a new guise.

For these reasons, Senator, and others that are no less important, I believe the ERA should be rejected by this committee.

Thank you.

Senator HATCH. Thank you, Professor Erler.

We will put both of your written statements into the record. We appreciate you both summarizing. It has been very helpful to the committee.

[The following was received for the record:]

THE EQUAL RIGHTS AMENDMENT AND THE DISPROPORTIONATE IMPACT STANDARD

Testimony
of
Edward J. Erler
before the
SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
April 23, 1984

Mr. Chairman, I am honored to be here by invitation of this Committee. I appear as the representative of no group but merely as a private citizen who has an abiding interest in the perpetuation of constitutional government.

Any attempt to amend the Constitution must be approached with the utmost gravity. _The Federalist_ described the alteration of the fundamental law as a most "solemn and authoritative act." The burden of proof, therefore, must rest with those who propose to change the organic law of the nation to demonstrate that the changes are both necessary and certain to produce a salutary effect. It is my considered view that the supporters of the Equal Rights Amendment have failed to carry this burden.

The ERA itself is cast in vague language. Several witnesses have noted that the Amendment, if passed, would be the first that sought to protect rights that it does not specify or define. It refers merely to "equality of rights." Imprecise language of this kind is hardly suitable for inclusion in the text of the Constitution. Yet the supporters of ERA seem not to be troubled by the Amendment's imprecision. Senator Tsongas, one of the principal sponsors of the Amendment in the Senate, remarked before this Committee that whatever ambiguities or uncertainties that accompanied the ERA would eventually be resolved by the

Supreme Court. This is indeed a dangerous proposition. We already know what the Court can do to plain and unequivocal language. It suffices only to recall the Court's most recent interpretations of the Civil Rights Act of 1964. The Court has taken clear language prohibiting discrimination against individuals on the basis of race and construed it to permit--indeed require--discrimination on the basis of race, a result clearly at odds with the plain language of the Act as well as the manifest intentions of its framers. One hesitates even to speculate about what the Court might do with the vague and indeterminate language of the proposed Equal Rights Amendment. Incorporating such language into the Constitution would be tantamount to placing the Supreme Court in the role of a "continuing constitutional convention," hardly the role that Chief Justice Marshall envisioned for the Court when in Marbury v. Madison he described the Constitution as "the fundamental and paramount law of the nation" which was intended to be "a rule for the government of courts, as well as of the legislature." 5 U.S. (1 Cranch) 137, 180 (1803)(emphasis original).

The most important unresolved question involving ERA is the standard of constitutional construction that it will require. The ERA is couched in roughly the same language as the Fourteenth Amendment. It might be argued, therefore, that the explicit intent of its authors was to establish the same standard of constitutional interpretation for the ERA that already exists for the Fourteenth Amendment. For it would indeed be an anomaly to have the same constitutional language bear different meanings or be construed by different constitutional principles. But if the Amendment merely seeks to reduplicate the Fourteenth Amendment then it is superfluous. If the ERA merely means to assert that an individual's rights cannot be "denied or abridged" solely "on account of sex," then it is difficult to see how the ERA adds anything to the equal protection clause of the Fourteenth Amendment. After all, the Fourteenth Amendment extends its protection to "all persons" and has been applied assiduously by the courts in recent years to insulate individuals from invidious gender classifications.

But the proponents of ERA have made it clear that they believe the Amendment will establish more radical standards than those currently required under the Fourteenth Amendment. Virtually all its supporters agree that the ERA will require the Court to test gender classifications by the standard of "strict scrutiny," the standard that the Supreme Court has developed over the years for racial classifications. Professor Thomas Emerson, for example, has remarked that "[a] complete bar against classification by race has, for all practical purposes, been applied in race discrimination cases. It is equally necessary to secure gender equality."[1] Emerson defines "gender equality" as the prohibition of "any differentiation in legal treatment on the basis of sex."[2] The Supreme Court, however, has declined--with some tergiversations (See Frontiero v. Richardson 411 U.S. 677 [1973])--to extend this protection to gender classifications.

All laws classify in one form or another. Every law of necessity treats different classes of people differently. Quite clearly, equal protection of the laws does not demand that everyone be treated equally but only those who are similarly situated, i.e., in the same class. The general test of classification under the equal protection clause is whether the classification created by the law is a reasonable one in light of the constitutional purpose to be served by the legislation, and whether the means chosen to effectuate that purpose are reasonable. But laws classifying on the basis of a "suspect" category--race, religion, or national origin--are presumed to be unreasonable absent a showing of some compelling necessity for the classification. As the Court noted in Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979),

> Certain classifications. . . in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. . . . This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination.

Since the "strict scrutiny" test presumes that classifications based on race are *ipso facto* unreasonable and therefore arbitrary, it is virtually impossible to carry the burden of demonstrating a "compelling necessity.

The Supreme Court, however, has never accepted the relevancy of this analysis for gender classifications, preferring instead an intermediate test resting somewhere between reasonableness and strict scrutiny. As Justice Stewart remarked in his concurring opinion in *Michael M. v. [illegible]noma County Superior Court*, 450 U.S. 464, 477-8 (1981), a case upholding a statutory rape law that made males, but not females, criminally liable,

> [t]he Constitution is violated when government, state or federal, invidiously classifies similarly situated people on the basis of the immutable characteristics with which they were born. Thus, detrimental racial classifications by government always violate the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated. . . By contrast, while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes. In this case we deal with the most basic of these differences: females can become pregnant as the result of sexual intercourse; males cannot.

While the Court has never agreed that gender classifications are analogous to racial classifications, it has often noted that "the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification" and that "[t]he burden is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982)(O'Conner, J.); *See Craig v. Boren*, 429 U.S. 190 (1976). Thus, the "heightened judicial solicitude" accorded gender classifications, while strict, recognizes that gender and race are not equivalent for the purposes of equal protection analysis. The Supreme Court has recognized that some gender distinctions can play a legitimate role in the formulation of public policy, and that there are indeed real differences--physical, biological, among others--that do not merely reflect "archaic and stereotypic notions" about the role of women in society.

But this intermediate level test is not the one favored by most supporters of ERA. Professor Emerson testified that strict scrutiny would be required by ERA because "[i]t would seem apparent . . . that the doctrinal structure currently in use by the Supreme Court for the decision of sex discrimination cases is wholly inadequate to eliminate the sex bias that is deeply embedded in our society."[3] The requirement that all gender classifications meet the test of strict scrutiny would mean that whatever would be disallowed on account of race under the Fourteenth Amendment would also be disallowed "on account of sex" under ERA. Since the strict scrutiny test is "'strict' in theory and fatal in fact,"[4] virtually every classification subject to this test will be invalidated. No classification based on race, for example, has survived this heightened judicial scrutiny since the Court approved the Japanese exclusion orders in *Korematsu* (1944).

But the supporters of ERA demand more than the adoption of strict scrutiny as the test of gender discrimination. In *addition* to strict scrutiny, its supporters claim that ERA will require an effects standard of discrimination. Under an effects standard, a law which is neutral on its face and which is not traceable to any discriminatory intent must nevertheless be judged discriminatory because of its disproportionate impact. This, of course, establishes a much more radical standard of discrimination than that of strict scrutiny. Professor Emerson in his 1971 *Yale Law Journal* article, an article that is widely regarded by the supporters of ERA as an authoritative work for understanding the likely impact of the amendment, notes that

> classifications, though formulated without explicit sex reference, may in practice fall more heavily on one sex than the other. This opens the possibility that non-sex based classifications can be used to circumvent the Equal Rights Amendment. . . . Such a law or governmental regulation would constitute a serious evasion of the Equal Rights Amendment. . . . The courts

> have responded by looking into the realities of purpose, practical operation, and effect.[5]

One example adduced by the article is that "mental and physical standards" for the military must be "neutral as between the sexes" to ensure that they "do not operate to disqualify more women than men." This view has been echoed by many proponents of the Equal Rights Amendment. The U.S. Civil Rights Commission in its 1978 report stated that "[e]ven laws neutral on their face, but that affect one sex more harshly than the other, would have to be reexamined."[6] In a similar vein, it was stated in testimony before the House that "government programs that provide financial support--such as public employees' pensions, Social Security, and welfare programs--will also be required to meet the Equal Rights Amendment's mandate of equality. . . [P]rograms will have to be reformed to eliminate any aspects which have a disproportionate negative impact on one sex."[7] These are but a few of the statements that could be cited to elucidate the fact that its supporters strongly believe that the Equal Rights Amendment will institute a disproportionate impact test of gender discrimination.

The adoption of a disparate impact test will require a radical departure from current interpretations by the Court. The Court has always insisted upon a showing of discriminatory intent under the equal protection clause. Disproportionate impact has never been, in and of itself, proof of discrimination under equal protection analysis. As the Court remarked in Washington v. Davis, "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." 426 U.S. 229, 239 (1976). This does not mean, of course, that a discriminatory purpose must always be expressed on the face of a law. A discriminatory purpose can be inferred from "the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." Id. at 242. Whenever a discriminatory purpose can be inferred from "the totality of the facts," that purpose is subject to the most stringent "strict scrutiny." But a necessary prelude to the invocation of the strict scrutiny test is a showing of discriminatory purpose, that those who created the law or policy acted at least in part because of--not merely in spite of--its disproportionate impact on an identifiable class. See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

Using this analysis, the Court upheld a Massachusetts veterans' preference law which had a disproportionately adverse impact on women, but which was held not to have "been enacted for the purpose of discriminating against women." Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 260 (1979). As the Court noted "[m]ost laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law." Id., at 272. And as the decision noted, "the settled rule [is] that the Fourteenth Amendment guarantees equal laws, not equal results." Id., at 273. Since the Massachusetts law explicitly included women in the class of veterans who were accorded preference, the classification--despite its disproportionate impact on women--could not be looked upon as a pretext for gender discrimination.

If an effects test were required by the ERA, any disproportionate impact adversely affecting women would be prima facie evidence of discrimination. It would regard laws having a disproportionate impact the same as those that expressed a gender classification on their face. Many have noted that ERA would specifically overturn the Feeney decision. It has also been urged that the dissent of Marshall and Brennan in Feeney would provide the appropriate analysis. Marshall and Brennan would have struck down the veterans' preference law because "the foreseeable impact of a facially neutral policy is so disproportionate, the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme." 442 U.S. 256, 284). Thus, once disproportionate impact had been shown, the law would be tested by the criteria of suspect classifications. It is certain that under ERA veterans' preference laws would be unconstitutional. Professor Ann Freedman, a leading advocate of ERA, noting that the dissent in *Feeney* would provide the point of departure for analysis under ERA, remarks that "*strict judicial scrutiny* under the ERA would be required if a neutral rule that has a disparate impact on members of one sex or perpetuates discriminatory patterns similar to those associated with facial discrimination."

Thus few--if any--laws would survive that have an adversely disproportionate impact on women, even though the adverse impact is not traceable to any intention to discriminate. The range of laws that will be challenged in the rush of litigation that is certain to be occasioned by the passage of ERA is staggering. Probably no aspect of American political and social life will remain unchanged. Prostitution laws are a good example. Prostitution laws have a disproportionate impact on women because more women are prostitutes than men. A facially neutral law banning all prostitution would still have a disproportionate impact on women. Could this be justified under strict scrutiny? Since the standards of strict scrutiny are so difficult to satisfy, it is unlikely that state prostitution laws could survive such rigorous analysis. It is doubtful that any of the traditional reasons that justify an exercise of a state's police powers will be good enough to satisfy the requirement of demonstrating a "compelling necessity." If the laws are designed to protect women, they would be struck down as perpetuating stereotypes about the weakness of women. The same would be true of laws against prostitution designed to protect family life, since these laws too would be based on stereotypical views of the role of women. Justifications based on health and safety are likely to fail as well. A host of laws providing (or denying) social services and welfare benefits would also be subject to challenge under ERA, since these laws tend to have a disproportionate impact upon women.

Disparate impact analysis currently exists under Title VII of the Civil Rights Act of 1964. A showing that hiring practices have resulted in disproportionately fewer females being hired creates a *prima facie* case of discrimination. This places the burden on the employer to demonstrate that the disproportion did not result from an intention to discriminate. The requirement is not that the particular decisions made by the employer are non-discriminatory, but that non-discriminatory reasons exist, whether they were the actual reasons relied upon or not. This defense is, in turn, subject to challenge by the complaining party, but the "ultimate burden of persuading the trier of fact that the defendant *intentionally* discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)(emphasis added). While disproportionate impact has an important role under Title VII, the requirement still is for the complaining party to show "by a preponderance of the evidence" an *intention* to discriminate. The evidence of disproportionate impact is given greater weight under Title VII than under the Fourteenth Amendment. But Title VII is a narrowly drawn statute aimed at preventing gender discrimination in employment. The analysis required by Title VII would be, in my opinion, inappropriate to the more extensive reach of the Fourteenth Amendment or to the ERA. But its proponents claim that ERA would require a more rigorous test of gender discrimination than Title VII. Title VII does not require strict scrutiny, since it is possible to rebut the *prima facie* claim of discrimination by a showing of "some legitimate, non-discriminatory reason for the employee's rejection." *Id.*, at 253. Under Title VII numerous employment practices have been struck down, including height and weight requirements for prison guards, strength requirements, difference in pay for comparable--but not equal--work, etc. Yet the standard of discrimination established by ERA would be more radical and more extensive that that required by Title VII. Simple proportionality based on sex will be the new test of discrimination required by the Equal Rights Amendment. It is difficult to imagine any state action involving an adversely disproportionate impact on women that would survive under ERA.

The standards that most supporters agree would be required by ERA for gender discrimination would be--ironically--more exacting than those required for race discrimination. Under the Fourteenth Amendment the necessity of tracing an allegedly discriminatory law to a discriminatory purpose on the part of the lawmaker would remain, whereas it would not be required under ERA. This would indeed be an anomaly since it can hardly be said that women have sustained the same assaults upon their rights as have certain racial groups. Women have had no affront to their rights and dignity equivalent to the Dred Scott decision that held that blacks could never be citizens of the United States, nor were there any rights belonging to blacks that the white man was bound to recognize. Despite the hyperbole that has characterized recent debate over women's rights, women as a class have never been chattel slaves, nor have they been subjected to the same hostile legislation as blacks. The laws and court decisions that feminists complain most vociferously about were ones that, by and large, were intended--however misplaced the intentions might have been--to benefit and protect women. This was not the case with blacks, who were subjected to a variety of discriminatory laws and hostile court decisions that were designed, not indeed to protect them, but to perpetuate second-class citizenship for them. I find it impossible to imagine any racial classification that could serve a legitimate purpose in constitutional government, although I can think of many gender classifications that could. These would include those based on physical or biological differences. Race is simply not analogous to gender from the point of view of determining what is required for the protection of "equal rights." As the Court remarked in Rostker v. Goldberg, the case upholding Congress' authorization of male only draft registration, "[t]his is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white. . . registration. Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft." 453 U.S. 57, 78 (1981). But there are many who argue that under ERA "women will serve in all kinds of military units and they will be eligible for combat duty. . ."[8]

But even the proponents of ERA implicitly admit that race and gender are not analogous concepts. It is said that, despite the absolutist language of ERA, there will be exceptions to the strict scrutiny requirement, exceptions that stem from "unique physical characteristics" and from so-called "benign" gender classifications that benefit the class interests of women. It should be thus clear to almost everyone that the debate over ERA is not a debate about equal rights, but about equal results. The requirement of a standard of proportional results, if it were indeed to be embodied in the ERA, would simply mean that the ERA will be an Amendment to the Constitution which, in effect, would "constitutionalize" affirmative action for women. It is therefore no accident that the proponents of the Amendment exempt gender classifications promoting affirmative action from the reach of ERA. The ERA will undoubtedly be read by the Court as providing class remedies for "historic" class injuries. Whatever one may think of remedies for "historic" discrimination, these remedies can be more appropriately formulated and applied in specific legislative acts. Legislation is the appropriate place for flexible responses to particular problems, and can be repealed when the specific problems are met.[9] These remedies, of course, will become permanent class entitlements if ERA becomes a part of the Constitution. In an unprecedented burst of candor, the California Commission on the Status of Women remarked that "[t]he touchstone of ERA commitment is the comfort with which one can envision a totally 50-50 sharing of every occupation. . ."

Comparable worth, an idea that is already receiving the imprimatur of the federal courts, is a major step in the direction of "50-50 sharing."

I do not believe that there exists today any constitutional or legislative bars that prevent women from enjoying equal rights. The door to equal opportunity for women has been open for years, protected, not only by the Constitution, but by numerous federal and state laws. Yet, we are still incessantly admonished that it is necessary to take extreme measures to break down sex discrimination barriers. What this argument implies is that since equal opportunity does not automatically lead to equal results, it must be presumed that there is widespread discrimination. This argument is based on the notion that if there were a truly non-discriminatory system, results would be proportional, not only based on race and gender, but a host of other attributes as well. The necessity for maintaining the illusion of continued discrimination is clear: if the illusion were not maintained, then such measures as affirmative action would have to be seen in their true light as measures which are demeaning and condescending to women, i.e., as constitutionally unsound for "stigmatizing" women as a class by perpetuating "stereotypical" ideas of women as inferior and not capable of competing on the basis of individual merit. To my mind, affirmative action, is "romantic paternalism" at its worst.[10]

I don't think the citizens of America relish the idea of a proportional society where one's rights are conditioned by the class one inhabits, whether it be a racial class, a religious class, or a gender class. The ERA will necessarily enshrine this class analysis in the Constitution if it requires the disproportionate impact standard as the test of "equal rights." Once the disproportionate impact test is in place the touchstone of equal rights will be proportionality based on gender. A truly non-discriminatory law will be one that operates--not indeed equally--but proportionately. Proportionality will not be a test of individual rights but a test of how an individual fares as member of a class. This is not a view that looks forward to the protection of "equal rights" but one which is determined to guarantee "equal results." As almost everyone knows, the two are not the same.

Constitutional government is a government of rights which abstracts from the class status of those whose rights are to be protected. A disproportionate impact standard conditions an individual's rights by his or her class status. The disproportionate impact standard resurrects the old separate but equal doctrine under a new guise. The vague language of ERA is open to almost any interpretation. Its language gives no guidance for its application. It will be left for the courts to determine its extent. The federal courts have already intruded into almost every aspect of American life and the ERA will merely give courts the opportunity to be more intrusive. There is probably no aspect of American life that will remain untouched in some way by the passage of ERA. I, for one, am not content to give such an extensive and ill-defined power to the federal judiciary. Matters involving gender discrimination should be handled by particular acts of legislation. And I think everyone must admit that Congress has not been reticent to pass legislation aimed at protecting the rights of women. The passage of ERA would be, in my view, an abdication of Congressional responsibility to meet particular problems in a forthright manner. For these reasons, and others no less cogent, I believe the ERA should be rejected by this Committee as incompatible with the principle of constitutional government which places primary law-making responsibility in the legislative branch.

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1. Testimony of Thomas I. Emerson before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, Oct. 19, 1983.

2. Brown, Emerson, Falk, and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L. J. 871, 873.

3. *Supra*, note 1.

4. Gunther, *The Supreme Court, 1971 Term--Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

5. *Supra*, note 2, at 898 (emphasis added).

6. STATEMENT ON THE EQUAL RIGHTS AMENDMENT (December, 1978), 8.

7. Testimony of Dorothy Ridings before the Subcommittee on Civil and Constitutional Rights of the the House Judiciary Committee, Sept. 14, 1983.

8. *Supra*, note 2, at 978.

9. *See* Tyler, *Constitution Isn't Place for Remediation of Bias*, Wall St. J., Jan. 25, 1984, at 30, col. 3.

10. *See*, Mansfield, *The Underhandedness of Affirmative Action*, 36 NAT'L Rev., May 4, 1984, at 26.

Senator **Hatch**. Senator Thurmond, do you have an opening statement?

SENATOR STROM THURMOND, CHAIRMAN, COMMITTEE ON THE JUDICIARY

The **Chairman**. Mr. Chairman, I do not have an opening statement, but I do have a few questions.

Senator **Hatch**. Would you care to go ahead with your questions?

The **Chairman**. Thank you.

Professor Wegner, former Senator Sam Ervin, a member of the Judiciary Committee—from your State, by the way——

Professor **Wegner**. Yes, I understand that.

The **Chairman** [continuing]. Has written that the ratification of the equal rights amendment would operate as an inexorable command of the Constitution, invalidating all existing Federal and State laws based on the reality that there are physiological and functional differences between the two sexes, which God created to perpetuate human life on Earth.

Professor Wegner, do you agree with Senator Ervin's analysis, and if not, why not?

Professor **Wegner**. No, Senator; I disagree. I very much respect Senator Ervin. However, I disagree with his views on this particular issue.

I think that we have seen already that his prediction would not come true—that, for example, rape laws have been upheld even though they have been focused on protecting women who would be vulnerable to a unique and especially severe injury insofar as they might be sexually assaulted by a male, I would cite that as one example that would refute his claim.

The **Chairman**. I want to ask you this question. I think most people feel that when they say "equal rights," they really mean equal pay, equal pay for equal work. Is that your main concern on this amendment, or do you really feel that concerns of every kind, even combat and abortion, for example, should be provided in this amendment?

Professor **Wegner**. Senator, I can give you a personal example as far as combat. I was in college during the Vietnam war period, and I felt very strongly that if my male colleagues would be subject to the draft, that I should, too, insofar as I would then be put to the question whether I should exercise rights to object conscientiously or so on. I think we are talking about equal rights and equal responsibilities, and those run the full gamut, not just in employment, but of service to the country in many different respects.

I am sure that if you were to put that same question to a man, that he would respond as well, that there are more concerns as far as equality goes than employment—concerns about educational opportunities, concerns about being subject to criminal laws, about rights as far as the family goes, and many other things that the equal rights amendment would address beyond the realm of employment.

The **Chairman**. I certainly favor equal pay for equal work. I remember when I taught school, the men in the school probably made 25 percent more than the women, and I did not think it was right then, and I do not think it is right now for men to be paid any more for the same work. But most people I talk to seem to think that is the main thing that ought to be corrected, that is, that women ought to be paid on the same basis as men for the same type work.

Professor WEGNER. Well, I certainly agree that they should be, and I am very glad that we have had action under, for example, the Equal Pay Act, under title VII and so on, that are designed to get at that issue. I think we need the kind of permanent protection, however, that the ERA gives in that arena, and in addition, that we need protection in other areas, as well.

Professor ERLER. Senator, if I could just speak to that question, I agree with you that equal pay for equal worth should be a principle that we should abide by, but I do not think that is precisely the question the equal rights amendment addresses. If that were the case, the equal rights amendment would simply be superfluous. Unequal pay for equal work is disallowed now, under the Equal Pay Act and under the 14th amendment.

The issue is not equal pay for equal worth but equal pay for comparable worth. A Federal district court in the State of Washington——

The CHAIRMAN. Maybe I used the wrong word.

Professor ERLER. I think the issue under the equal rights amendment is not equal pay but comparable pay. If it were merely an issue of equal pay, I think there would simply be no reason to have an equal rights amendment.

Senator HATCH. Why don't you just explain for a second what you mean by "comparable pay."

Professor ERLER. There must be equal pay, indeed, for equal work, but work which has been deemed or designated as comparable—for example, the work of a secretary might be deemed comparable to the work of a long-haul truck driver, and although it is not equal work, if they are deemed to be comparable jobs, then of course, they should receive equal pay. That is the issue of comparable worth. That is the issue, I think, of the equal rights amendment, not the issue of equal pay for equal work.

The CHAIRMAN. In fact, under the statutes now, that is required, isn't it?

Professor ERLER. That certainly is required now, yes.

The CHAIRMAN. Equal pay for comparable work.

Professor ERLER. Well, under the statutes now, of course, it is equal pay for equal work. Some of the Federal courts are interpreting title VII to mean equal pay for comparable worth. I think that that happens to be a mistake. But I think if the equal rights amendment were passed, the Federal courts would almost be obliged to rule that equal rights requires equal pay for comparable work—not equal work, comparable work.

Senator HATCH. Excuse me, Senator. Would you yield for one question?

The CHAIRMAN. Yes.

Senator HATCH. Do you agree with that, Professor Wegner, that conclusion?

Professor WEGNER. I think, without looking at the specifics of the nature of the job classification, that we perhaps do not have a full picture here. I think there is a critical evidentiary issue about the comparability of the jobs. I think if indeed the jobs are comparable, that if there were not adequate justification, that yes, there would need to be equal pay.

Senator HATCH. You are saying if we could divine economic, social, or other analysis that showed that a secretary's job is comparable to a long-haul truck driver's job, then they should be paid on an equal basis?

Professor WEGNER. Yes, I do, Senator. I should point out, however, that that equation is a fairly complicated one to make.

Senator HATCH. I agree with that.

Professor WEGNER. I think, if I remember correctly, there is at least one case under a State equal rights amendment which looked at the jobs of two classes of police officer, one of whom basically handed out parking tickets and another of whom had duties in other respects—arrests, I think, and things of that sort—and found that those were not equivalent, and that they therefore could be sustained as independent classes.

Senator HATCH. Well, there are difficult evidentiary problems, but the principle is one that you agree with, the principle of comparable worth?

Professor WEGNER. Yes.

Senator HATCH. And you would agree with Professor Erler that the principle of comparable worth is a distinctly separate principle from the principle of equal pay for equal work.

Professor WEGNER. Yes. I think it is an expansion of the notion of equal pay for equal work.

Senator HATCH. Generally, the law is equal pay for equal work today. There are only a few isolated decisions—*Guntner*, for example—where the comparable worth issue has been issued?

Professor WEGNER. Well, as he said, that is a breaking area which is now being litigated. The Supreme Court case in *Gunther* in 1971 had touched on that, and I think the ongoing litigation will bring further light on that question.

Professor ERLER. Excuse me. If I could just say a word here, Senator.

Senator HATCH. Yes.

Professor ERLER. I think that equal pay for comparable worth is an extension of equal pay for equal work, only insofar as we allow the ingredient of disparate impact to come into play. As the matter is being currently regarded, any job classifications where women predominate is simply assumed to be predominantly women because of discrimination. It almost establishes a prima facie case of discrimination.

Senator HATCH. You are saying that is not necessarily the case.

Professor ERLER. That is not necessarily the case, and comparable pay is being widely touted as a remedy for gender discrimination based upon a disparate impact analysis.

Senator HATCH. For something that may not involve intentional discrimination.

Professor ERLER. That is true—certainly, may not involve purposeful and intentional discrimination.

Senator HATCH. I see.

Thank you, Senator.

The CHAIRMAN. Would you mind giving, Professor Erler, a practical example of equal pay for equal work which you do favor, as compared with equal pay for comparable work, which you do not favor.

Professor ERLER. Well, I think those who do equal jobs should be paid equally.

Senator HATCH. Well, you agree with equal pay for equal work. You disagree with equal pay for comparable work.

Professor ERLER. Yes. If a man is a long-haul truck driver and a woman is a long-haul truck driver, they should be paid equally fo equal work. I have no problem about that. But the difficulties of deciding what jobs, what occupations, are comparable to one another is an almost insurmountable task. How can you say that the job of a secretary, for example, is equal to the job of a long-haul truck driver? And not only is the difficulty in determining which jobs are comparable, but the assumption that those jobs in which women predominate, that that is prima facie evidence of discrimination, simply does not seem to me to be a very good way of considering the issue.

The CHAIRMAN. As a matter of fact, isn't the pay question the paramount question with both of you? Isn't that really the paramount question?

Professor WEGNER. No, Senator. I would stand by what I had said earlier, that there are broader areas of concern—that is one, but that is not the exclusive one.

Professor ERLER. I think it is a major area of concern, but as I said in my opening remarks, I think the issue of the equal rights amendment is not to the issue of equal rights, but the issue of equal results. That is why many of the proponents of the equal rights amendment are advocating the acceptance or the adoption of this disparate impact standard. Disparate impact is a view that takes its point of departure from proportional results.

Professor WEGNER. Senator, if I might clarify something that Professor Erler said, it seems to me that a statement that the equal rights amendment would require every job class to include 50 percent women and 50 percent men, or in light of the somewhat greater than that proportion of women in society——

The CHAIRMAN. These microphones are not too good, so if you could speak right into it a little louder.

Professor WEGNER. All right. I think that the notion of a disparate impact standard does not require 50 percent men and 50 percent women in every job class, because a facially neutral classification scheme may well be upheld if justified by the needs in question, the needs of the job. I do not think that if it could be shown that strength is required to perform certain functions on the job, and if women were not able, as a class, to have the same level of strength as men, that there would be 50 percent women in that job. So, I would disagree with his statement that we are simply looking at some sort of mandated result in this fashion without looking at the level of justification.

The CHAIRMAN. Thank you.

Now, I have several questions I would like to propound to each of you.

Professor Erler, section 2032 of title 18 of the United States Code makes it a criminal offense for a man to have carnal knowledge of a female under the age of 16 who is not his wife. S. 501, a bill recently forwarded to the full Senate by the Judiciary Committee, would amend this section so that it would apply to both sexes and make it possible for a female to be charged with statutory rape of a male youth less than 16 years old.

Ostensibly, under a ratified equal rights amendment, this provision, amended in this way, would not be invalidated because it would apply equally to both sexes. Assuming that the offense of rape consists of sexual intercourse with another person by means of force, and without the other's consent, and that, as a practical matter, a woman is physically incapable of perpetrating such an act upon a man, what effect, if any, would the ERA have upon such an offense and the laws creating it?

Professor **Erler**. Well, that is a rather involved question, Senator, but let me see if I can't begin an answer to it.

This bill, of course, would specifically overturn the Supreme Court decision of *Michael "M"* v. *Sonoma County Superior Court*, in which the U.S. Supreme Court upheld a California law which provided criminal liability for the male but not for the female in cases of statutory rape.

Statutory rape laws, as well as rape laws generally, I think, have a disparate impact upon women: If that is the case, and if it is true that the disproportionate impact standard will trigger a strict scrutiny test under the equal rights amendment, I think that laws of the kind that you describe will have to be invalidated under the equal rights amendment. I think the Court would be forced into overturning its decision in the *Michael "M"* case.

The **Chairman**. Now, Professor Wegner, assuming that such gender-based Code provisions as 18 U.S.C. 2032 were never amended, and the ERA were to eventually be ratified, would such provisions, which are obviously under-inclusive of the total class of persons who could benefit from special protection be made all-inclusive of those individuals in need of protection, or would they simply be struck down by the Federal courts as being unconstitutional?

Professor **Wegner**. Senator, I am sorry to say that I do not remember the text of section 2032 of title 18, whether it is facially neutral or whether it refers specifically to a man's conduct.

Could you help me on that?

The **Chairman**. Yes, it refers specifically to men.

Professor **Wegner**. It refers specifically to men. I think that we saw in the Supreme Court's *Michael "M"* decision that the statutory rape law that specifically applied to conduct by a male and not his female coparticipant was upheld, using the *Craig* v. *Boren* test. The Court was sharply divided in a 5-to-4 decision.

Let me clarify something again that Mr. Erler suggested. I have not said that a facially discriminatory gender classification would be subject to the *Craig* v. *Boren* standard. I firmly believe this—I think generally, proponents of the ERA do—that a compelling state interest or a qualified absolute view would obtain as to facially discriminatory classifications.

What I have suggested is that as to a facially neutral standard, should that statute be adopted to apply in a facially neutral way to both men and women involved in such conduct, that indeed it might be upheld in the same way that it was upheld under *Michael "M."*

I am not familiar with the particular Senate bill that you have alluded to, so I am not sure whether you indicated that it would be applied so that either a man or a woman could be involved in the rape of a younger individual, or whether you are saying that both, as in the *Michael "M"* case, the woman who was under age, as well as the man, would be penalized for that act. Could you clarify that point?

The CHAIRMAN. We take the position that the perpetrator could be of either gender.

Professor WEGNER. The perpetrator could be of either gender.

I think that many State statutes have been expanded in that fashion and that that is wholly consistent with the approach being urged in connection with the ERA, that where conduct could be perpetrated either by a man or a woman, that they should equally be liable to criminal punishment for it. I think that that would be the case under not simply a disparate impact standard, but that would be the case where you had a statute that was facially applicable only to one sex. So I think that is not changed by what we are talking about today.

The CHAIRMAN. Professor Erler, do you want to comment on that?

Professor ERLER. Yes, if I could, please, Senator.

I think that the general issue that is involved here is simply that a law which is gender-neutral on its face is not enough, because when we confront the issue of disparate impact, we have to see how the law affects one gender or the other gender.

Now, I know that Professor Wegner differs a little bit from other advocates of the equal rights amendment, but if a law has a disparate impact, a disproportionate impact, upon one gender, I think that the courts are going to have to treat that law as if it had a facial classification, that is to say, as if it classified on its face on the basis of gender.

Now, we can argue about which test the court is likely to adopt once it is faced with a disparate impact situation. I happen to think, and I think most proponents of the ERA think, that the court should and would require the strict scrutiny test. Professor Wegner believes that it will require only the intermediate test, under which it suffices to show that there is an important governmental interest and that the classification is substantially related to the effectuation of that purpose.

But even this intermediate test is a very stringent test. As the court recently said, there have to be "exceedingly persuasive arguments" put forth in order to sustain any kind of gender classification, and I take that to mean any kind of gender classification that is inferred from a disparate impact.

So the issue here is not whether the law merely classifies on its face, but whether the disparate impact, or the effect of the law, is such as to infer a classification.

The CHAIRMAN. Now, Professor Erler, assume for a moment that you are a Member of Congress, strongly opposed to the practice of abortion. Taking into consideration the additional factors of an almost certain ratification of the ERA and the strong likelihood that the Supreme Court would apply the "but for" test, reaffirmed in *Newport News Shipbuilding and Dry Dock Company* v. *EEOC*, against an anti-abortion law should it be challenged in court. Would you as a member of Congress today push for the amendment of the ERA so that it is clear that the passage of the ERA is not intended to have the effect of strengthening abortion rights for women?

Professor **Erler**. That is a rather difficult question, Senator, but I think that I would be in favor of such an amendment.

Of course, again, in certain respects, the proponents of the ERA would like to have the best of both possible worlds: that insofar as the laws might classify on the basis of gender, many proponents say it should be tested by strict scrutiny. Yet they say that there are some exceptions to the strict scrutiny test, and those would be exceptions based upon unique physical characteristics—insofar as women have unique physical characteristics, laws should not be tested by strict scrutiny, but by some other standard, or again, the exceptions go to so-called benign classifications or benign quotas that benefit the class interests of women.

So I think that probably the court in this instance would say, as they have said, that abortion rests within the zone of privacy and is somehow exempt from the equal rights amendment.

So I think that I would favor your suggestion to have an amendment to the Equal Rights Act restricting its reach on the question of abortion.

The **Chairman**. Professor Erler, the authors of the now-famous 1971 Yale Law Journal article on the equal rights amendment state that the proposed amendment would allow no exceptions insofar as the military is concerned, and that men and women must therefore be treated exactly the same, with one exception. They suggest that pregnancy would justify slightly different conditions of service for women.

Assuming that the effects test would be applied by a court reviewing a challenge to regulations providing different conditions of service to pregnant members of the armed services, would there be any way that such disparate treatment could be continued under a ratified ERA?

Professor **Erler**. Well, Senator, this brings up the question that I just addressed, and that is in the sense that proponents of the ERA want to have no exceptions, but then they turn around at the same time and say there should be some exceptions. Now, what principle this establishes is beyond me. Pregnancy, of course, is one of those unique physical attributes that I mentioned a moment ago.

I know that the 1971 Yale Law Review article said that there would be no exceptions for military, that women should serve in combat roles and in all kinds of military units.

It would seem that the equal rights amendment, if taken in its most absolute language, or if taken in its literal language, would prohibit such exceptions. But the proponents of ERA seem to say that there are exceptions that are engendered by unique physical characteristics. How this comports with the principle of the ERA is, again, beyond me.

Senator HATCH. It does not usually comport with arguments for the lowering of standards.

Professor ERLER. No, it does not comport with the argument for the lowering of standards, because, as I mentioned earlier, the ERA is not an amendment to the constitution that looks forward to equality of rights, in the sense of equality of opportunity, but looks forward to equality of results. That is why the proponents say that there are certain exceptions, exceptions based upon the unique physical characteristics of women. So that if the strength requirements, for example, for getting into the military impact disproportionately upon women, those standards will have to be changed.

Senator HATCH. That is my point. They will want to lower the standards, so there will be equal results as a result of those lowered standards.

Professor ERLER. I agree, yes.

Professor WEGNER. Senator, if I might interject, I think perhaps tailoring would be a preferable descriptive term, rather than narrowing it. I think there is really quite a difference between the two.

Senator HATCH. Well, I said lowering.

Professor WEGNER. When I say tailoring, I think what I am saying is that there is a problem in assuming that everyone needs to be 6-feet tall to be able to lift a certain amount of weight, when that is not necessarily the case. I think we all have seen articles in popular magazines about women who have engaged in weight training of late, and you might have a woman who is extremely strong and who could pass the relevant strength standard, if strength was what was required in order to perform a function either in the military or otherwise. I think that is what is being asked, to avoid maintaining some sort of proxy based on height or weight—that is personal weight—and to move instead to some sort of test based on strength that is the capacity to perform the job. I think that is what is being asked.

Senator HATCH. We are not talking about women weightlifters. We are talking about women across-the-board having to serve in the military and perhaps in combat—women who may not be able to carry, for example, the weight presently required of men.

Professor WEGNER. What I am—pardon me.

Senator HATCH. Under those circumstances, there may be a drive to reduce those standards so that women will also be equally represent in serving in the military.

Professor WEGNER. I think that the ERA would only require that whatever strength standard—if the standard were that one needs to carry 100 pounds to be an effective person dealing in the infantry, something of that sort, that that would be sustained if one could show that 100 pounds weight lifting in order to function in combat was required, that that would indeed be sustained.

What I would object to would be if one assumes that you need to be 6-feet tall in order to carry 100 pounds of weight, because I think the correlation there is subject to question.

Senator HATCH. The question is who is going to decide these correlations: Supervisors or the courts?

The **Chairman**. Professor Wegner, I just have a few more questions, and then I will have to windup. I do not want to take too much time.

According to the 1971 Yale Law Journal article on the Equal Rights Amendment, under a ratified ERA there could still exist valid laws which treat one sex differently from another. Supposedly, if a law took into account physical characteristics unique to one sex, it could still withstand constitutional analysis. In adopting the "but for" test in the cases brought under title VII of the Civil Rights Act, has the Supreme Court eliminated all such "unique characteristic" exceptions as were once contemplated by the authors of the Yale Law Journal article?

Professor **Wegner**. I do not believe so, Senator. I think the theory behind that unique characteristic exception is that if there is a unique characteristic of one or the other sex, that one simply needs to recognize that there needs to be some modification in how the equality principle is applied, and that would be the case.

Now, you are referring to the *Newport Beach* case which involved title VII—I am not sure if I heard you correctly.

The **Chairman**. The 1971 Yale Law Journal article.

Professor **Wegner**. I am not sure that I caught the reference to the Supreme Court case you were referring to, but I think that, very clearly, the unique characteristics aspect that was contended to exist in that Yale Law Journal article and was seemingly very well-discussed at the last round of hearings, and when the ERA was discussed back in the early seventies, would continue to be observed.

The **Chairman**. I just have one more question of each.

Professor Erler, under the effects test, would a statute having a conscience clause allowing physicians and nurses to refuse to participate in abortions on the basis of religious conviction be allowed to stand?

Assume that a woman is seeking an abortion in a State-supported medical facility and is deprived of medical treatment that she might have otherwise gotten but for the fact that she is a woman.

How would you analyze this situation?

Professor **Erler**. Under the effects test, I think that that abortion could not be denied, Senator. If there were State action involved here, it would be action that had a disproportionate adverse effect upon women.

The **Chairman**. Professor Wegner, while the Supreme Court has rendered numerous decisions invalidating legal distinctions between men and women on the basis of equality of the sexes, the decisions in the abortion cases have continued to be based upon one of the Court's own inventions—the right to privacy.

What prediction would you have for the future of the right to privacy as applied to abortion cases if the equal rights amendment becomes the law of the land?

Professor **Wegner**. Senator, I think that the Court would continue to analyze the abortion cases under its existing theory. I think it has been clear in the history of the ERA deliberations that we are talking about a broad array of rights quite apart from abortion and that that would continue to be the case, that the ERA would deal with problems quite apart from abortion.

Professor **Erler**. Senator, could I say a word about your question?

The **Chairman**. Yes.

Professor **Erler**. We often hear from the proponents of ERA that a certain range of activities will be protected by the right to privacy, as you mentioned, the right to privacy that has been established by the Supreme Court. But I am not persuaded that the right to privacy will stand over and against the equal rights amendment. After all, the equal rights amendment will become a part of the constitution. The right to privacy is only a right which has been manufactured by the Supreme Court, as it said, inferred from other provisions of the Constitution. It is not itself a part of the constitutional text.

One of the places that it said that the right of privacy may be inferred is from the right to freedom of association contained in the first amendment. But we know that the right to associate cannot be a pretext for racial discrimination, that the 14th amendment certainly takes precedent over any associational rights that involve racial discrimination. The Equal Protection Clause of the 14th amendment certainly takes precedent over any freedom to associate which is merely a pretext for racial discrimination.

I do not believe that the right to privacy after the passage of ERA will have any limitation upon what will be required by the equal rights amendment.

The **Chairman**. Now I want to ask you a very practical question, and you both can answer it.

My State has dower rights for women. If the equal rights amendment is passed, would dower rights be destroyed for women?

Professor **Wegner**. Senator, I think many States have changed their existing statutes so that there would be equivalent rights for men and women. Whether that is seen literally by amending the Dower Act itself, or whether that is found by seeing some sort of forced share or other equivalent rights for men and women, that has generally been the movement in legislative action to date.

I am not specifically familiar with the South Carolina provisions, but there have been cases under State ERA's in which courts have found where there is an equivalent or comparable right for men and for women, even though one might be called dower and the other called curtesy or other use of forced share language of some sort, that that would be upheld if there is equivalent rights for both sexes.

The **Chairman**. Now, we have no similar provision that gives a man such a right; it is for women only. Dower rights for women amount to a one-third interest in their husband's land for life.

Professor **Wegner**. Senator, that might well be subject to attack under the existing interpretation of the 14th amendment. I think there has been litigation in various States on matters such as that.

The **Chairman**. Repeating the question, if the ERA passes, are the dower rights afforded women in my State going to be destroyed? What is your answer.

Professor **Erler**. My answer, Senator, would be yes, definitely.

Professor **Wegner**. Senator, mine would be yes, and it probably would be subject to challenge whether or not the ERA were passed.

The **Chairman**. Thank you both very much for your presence here and for your contributions.

Thank you very much, Mr. Chairman.

Senator **Hatch**. Thank you, Senator.

Now, let me start with you, Professor Wegner.

Just for the record, let me ask each of you if you could very briefly summarize your own understanding of what is meant by the concept of an intent test for identifying discrimination, and what is meant by the effects or disparate impact test.

I will start with you, Professor Wegner.

Professor **Wegner**. An intent test would require some demonstration of purposeful discrimination. It could be found either by a demonstration of facial discrimination based on gender, or indication such as in the *Yick W.* v. *Hopkins* case, that a statute is being applied in a discriminatory fashion.

In addition, the Supreme Court has recognized that intent can be shown by a variety of other factors, including impact. In most of the sex discrimination cases, though, there has not been an acceptance of impact, at least, impact alone, as grounds for showing intent.

Senator **Hatch**. But it would not have to be facial or overt discrimination to be identified as discrimination?

Professor **Wegner**. That is correct, but as it has been applied to date, we do not have much precedent suggesting that the Court is willing to go as far as they have, for example, in the race context, in which they have looked to the fabric of circumstances in recognizing the evidence of intent.

As far as an impact standard, I believe I spoke of that earlier, that adverse impact could entail either a disproportionate portion of the class affected under a neutral classification scheme, so that perhaps you would have 80 percent of that class being men and 20-percent women. For example, with the height or weight standards that I have referred to, it might be something like 30-to-1, the proportion of men who could satisfy a 6-foot height requirement as opposed to women. Disparate impact could also arise where a classification might be more severely burdensome upon women in some fashion.

Senator **Hatch**. It could be 55–45, or 49–51? The principle is the same, isn't it?

Professor **Wegner**. I think I indicated that the Court has recognized, in talking about substantial impact, even in the title VII context, that it is not every marginal impact any more than 47 and 53 or something like that, that would satisfy a disparate impact test. But I think something like 80–20 percent clearly would.

Senator **Hatch**. Professor Erler?

Professor **Erler**. I think that that is an accurate statement of the difference. Let me just say that the intent standard requires some showing of intention to discriminate on the part of the lawmaker.

Senator **Hatch**. Before somebody will be found guilty of discrimination.

Professor **Erler**. Yes, of course, that there has to be some showing of an intention or purpose to discriminate. This is the standard that is currently in effect with respect to the equal protection clause of the 14th amendment.

It is true that the intent does not have to be expressed on the face of the law, but that it can be inferred from the totality of the circumstances, which might include the impact or the effect of the law.

The effects test, on the other hand, merely assumes that a disproportionate impact, whether it is an impact upon one racial group or gender group is evidence of discrimination.

Senator **Hatch**. Whether or not there is any intent or purpose to discriminate?

Professor **Erler**. Despite the fact that there is no showing of intent or purpose to discriminate.

Where a law has a disproportionate impact on some recognizable class, it is simply assumed that the impact is evidence or probative of intent to discriminate. And I think under the effects test that the ultimate touchstone will be the idea of proportionality. We might say that an 80–20 disproportionate impact is evidence of severe disproportionality, but how are we to say that 53–47 is not evidence of disproportionality?

Wherever you want to draw the line for practical purposes, the ultimate test under the effects standard will be some notion of proportionality.

Senator **Hatch**. That gets to my next question. What would be the respective role of statistical types of evidence under these competing tests for identifying discrimination?

Professor **Erler**. I think that in the case of the intent test, statistical evidence can be used, but it is not proof; that it can be used to infer intention to discriminate—— .

Senator **Hatch**. It could be part of the overall circumstantial evidence used to——

Professor **Erler**. It could be part of what the Court has called the totality of the circumstances.

Under the effects test, however, I think that statistical evidence is dispositive, that if you can show that there is an 80–20 mix, for example, that in and of itself would be proof of discriminatory purpose.

Senator **Hatch**. Do you disagree, Professor Wegner?

Professor **Wegner**. Senator, I think that—well, I have two things to observe. First, we have to show, even under a disparate impact test, that the classification is somehow based on sex, and that that will therefore require some——

Senator **Hatch**. At least, that the results can be differentiated on the basis of sex. There is no difference there—you both are in agreement on that statement.

Professor **Wegner**. That it has to be shown to be because of sex, and that evidence——

Senator **Hatch**. Under the ERA.

Professor **Erler**. Under the ERA, yes.

Senator **Hatch**. OK. Go ahead.

Professor **Wegner** [continuing]. And that evidence of a statistical nature, therefore, I think again, has to be better than 53-47, because that is not strong enough to indicate that there is indeed a gender correlation, in my opinion.

Senator HATCH. And more importantly, do you agree with him that the statistical evidence, then, would become dispositive, to use his terms?

Professor WEGNER. Well, that is the second point. I would disagree with his use of the word "dispositive," insofar as he would suggest that it is dispositive of the outcome.

I would say I agree that it would be grounds for establishing a prima facie case that would require justification, but again, as I have tried to say repeatedly here, justification is in my mind the critical question, and depending on the legitimacy and fit, that indeed, something could be upheld; so dispositive insofar as creating a prima facie case, but not as to the ultimate result.

Senator HATCH. But both of you would agree, then, that the existence of the statistical evidence would then put the burden of proof on the defendant under the effects test?

Professor WEGNER. If it were adequate——

Senator HATCH. Under the ERA, right.

Professor ERLER. Yes, I think that is certainly true, that the burden of proof would be upon the lawmaker in that instance——

Senator HATCH. Which, under the intent test, pure statistical evidence alone would not result in that——

Professor ERLER. That is right, Senator.

Senator HATCH [continuing]. In that shifting of the burden.

Professor ERLER. That is true, yes.

I think that we might pursue the question of what the standard would be if under the effects test, let us say we find a disproportionate impact. Let us say we find a disproportionate impact of 80–20. What would then be the test of the rationale or the reasons that could justify such a disproportionate impact?

I think that that is really the question. I have said that most proponents of the ERA advocate that once there is a disproportionate impact, that that will trigger the strict scrutiny test.

Senator HATCH. Again, just for the record, I wonder if each of you could very briefly distinguish between the intent versus effects controversy and the equally important controversy over the appropriate standard of judicial review for sex-based classifications.

As I am sure both of you know, there are many who confuse these two difficult issues. To what extent, if any, are these issues related?

Professor Wegner?

Professor WEGNER. The Supreme Court has indicated that, under the 14th amendment, only if there is a demonstration of discriminatory intent will enhanced scrutiny be triggered under whichever of these standards we are talking about. In the case of sex, it is the middle tier standard. In the case of race, it is the strict scrutiny standard. Therefore, the test that we are talking about is really the level of inquiry that will be applied to a given zone of protection.

As it currently stands, only intentional discrimination is within that zone that will trigger enhanced scrutiny, whereas what we are talking about, under the ERA, as far as increasing that extent of protection is adoption of a disparate impact approach which will include a broader range of cases within the zone of those which would be subject to enhanced scrutiny.

Senator HATCH. That is what the ERA would result in.

Professor Erler, do you disagree?

Professor **Erler**. I think that what Professor Wegner says is true, that disproportionate impact will trigger some standard of enhanced scrutiny, or heightened judicial solicitude.

Senator **Hatch**. Which, to put in common terms, means that almost all sex classifications would be stricken by the Supreme Court as unconstitutional because of the enhanced scrutiny or strict scrutiny standard.

Professor **Erler**. I think that either one of the tests that the Court would choose to use to test laws that have a disproportionate impact are likely to have a radical effect upon the nature of American society.

Professor Wegner talks about the middle tier test, the important governmental interest test, that is currently in place for testing gender classifications. That is a very strict test. Very few laws can survive that test. If a law has a disproportionate impact based upon gender, and the middle tier test is used, very few laws are going to survive there. That is a very strict test.

Professor **Wegner**. But we have examples in which they have, for example, *Michael "M"* and the recent *Heckler* decision involving the Social Security Act pension arrangement. So I think again that that test, if it is applied to facially neutral classifications which result in adverse, disparate gender-based impacts, provides a good compromise in which there is careful inquiry. However, if there are indeed good choices made and close fit as far as the particular classification adopted in meeting the appropriate and legitimate and important governmental ends, then that could be upheld.

So, by no means will everything be struck down in this increased zone of protection. What we are talking about is at least a closer inquiry into a larger number of cases, and some, but not all, of them being struck down potentially.

Senator **Hatch**. Professor Wegner, am I correct that there are a variety of different tests for identifying discrimination that go under the general nomenclature of the effects or the disparate impact test? Which specific effects test do you believe would be read into the Constitution by the ERA. Could you describe the workings of this test briefly for us?

Professor **Wegner**. I am not certain that I am aware of exactly what you are touching on as far as specific alternative tests. There have been different——

Senator **Hatch**. Let me see if I can restate it. What precisely would be the responsive burden that would have to be born by the defendants under the ERA given evidence of a statistically disparate impact? Would it be a burden to demonstrate that (a) there was, in fact, no disparate impact; (b) there were legitimate nondiscriminatory reasons for their actions; (c) there were legitimate reasons and no alternative approaches likely to result in a lesser disparate impact, or (d) there were compelling reasons for such action.

Professor **Wegner**. That is a thoughtful question, Senator. First, I think it would definitely be in the realm of defendant's prerogative to dispute the prima facie showing as far as the sufficiency of the evidence on the existence of disparate impact. If, for example——

Senator **Hatch**. The sufficiency of the statistical evidence?

Professor Wegner. Yes, that there could be a refutation of the existence even of disparate impact sufficient to trigger any enhanced scrutiny.

Senator Hatch. But the burden does shift with regard to——

Professor Wegner. On that point, the burden to show the existence of disparate impact would be the plaintiff's burden. So that, if, for example, plaintiff brought in evidence showing that 80 percent of women were foreclosed by a height standard, defendant could turn around and say he had evidence to show that, no, it was only 50 percent who were foreclosed, and they could debate on that initial point.

Assuming, however——

Senator Hatch. But assuming that the plaintiff was able to show 80-20, then——

Professor Wegner. Assuming, however, that that had in fact been shown, I think that, as I said, there would be inquiry into the importance of the government interest and the fit.

Now, that has been applied, for example, in the title VI context—the *NAACP* v. *Medical Center* case is a good example of this. It has been applied in ways that indicate that there may be various alternatives, as you suggested. One would be to at least require the Government to have considered a variety of different alternatives, and I think that very likely would be an appropriate one to expect to see applied, that if there would be alternatives that could, in fact, be used that would have a lesser impact, that at the very least, those would have to be considered.

I think if there is a close call between those competing alternatives, the court would very likely not second-guess which, in fact, should be adopted. But if there were readily available alternatives that did have a better fit, that might well, in fact, be required.

Senator Hatch. Let me just ask you this. Professors Freedman and Emerson say at this point that the defendant would have to satisfy the strict scrutiny standard. Do you disagree?

Professor Wegner. Senator, they were writing in 1971, before the *Craig* v. *Boren*——

Senator Hatch. They testified this Congress on it.

Professor Wegner. OK, fine. I have not seen that testimony, although I had inquired about it. In my mind, the *Craig* v. *Boren* standard can very closely—can require a court very closely to inquire into matters and in many instances will strike down a classification without even getting to the level of compelling or strict scrutiny. So I think that you could see the same result on this *Craig* v. *Boren* standard in many instances, without even having reached the question to which those two would have to be applied.

Senator Hatch. Well, if the *Craig* v. *Boren* standard is the standard today, why do we need the ERA?

Professor Wegner. Again, here, I am talking about facially neutral classifications which are not currently applied to—which are not currently subjected to increased scrutiny beyond the rational basis test under the existing law.

I would agree with them that a compelling State interest or a qualified absolute standard, as is described in the Yale article should be applied where we are talking about facially discriminatory conduct, because that, just on the surface, is generalizing in a way that is requiring us to look at the whole class of men or women rather than to their individual situations, and that that calls for the strictest sort of inquiry.

What I am suggesting is that a court might well, where we are dealing with facially neutral classifications, which nevertheless have substantial impact, adverse impact, might well decide that there should be a slightly lesser test, but one that is a searching test nevertheless, as a means of getting to possible overbreadth or underinclusion of such facially neutral standards.

Senator HATCH. But you do, then, disagree with Professor Freedman on the standard of judicial review, assuming that I have quoted her correctly today.

Professor WEGNER. If I understand you as saying that as far as disparate impact, I guess I would disagree; if what she was addressing was disparate impact where we have facially neutral classifications. If we were dealing with facially discriminatory or purposeful discrimination, I would say compelling State interest or qualified absolute standard.

Senator HATCH. I see. One of the difficulties I have with the ERA is that we have much conflicting testimony on what it does mean, what changes it will result in, how it will affect our judicial and legislative systems, our system of values, our whole constitutional structure.

Professor WEGNER. Senator, if I could just make one more point on that, it seems to me in talking about what standard is to be applied, that is a question that we come up against many times as far as any future decisions by courts in whatever arena we are talking about. I do not think that the ERA is really that different in that regard as far as questions of the approach a court might take sometime in the future.

It seems to me that what we are suggesting is—I am sure, Professor Freedman, as well as I—that there would be closer inquiry here, and I think in a large number of cases, which of those two standards were adopted in this area might well not make a difference in the results.

Senator HATCH. OK. If each of you are correct, that discrimination under the ERA would be identified by some form of disparate impact test, it would be accurate, would it not, to conclude that the ERA would alter the present test for identifying sex discrimination.

Now, is that a correct conclusion? The present constitutional test, as I understand it, articulated in the *Feeney* case and elsewhere, is the intent test, is it not?

Professor WEGNER. Yes; the current test under the 14th amendment is the intent test.

Senator HATCH. So that would be changed by the ERA?

Professor WEGNER. That is what I am suggesting, that it could be interpreted in that way, yes.

Professor ERLER. I think it is certainly true that the ERA will change the intent test to one of effects.

If I could just say something about Professor Wegner's last remarks, the reason that the advocates of ERA are moving to an effects test is simply because of the alleged difficulty in showing purposeful or intentional discrimination. It is said that the effects test is simply a good way of ferreting out laws which are neutral on their face, but which are merely subterfuges for some kind of discrimination.

So it seems to me that the necessary analysis is that where there is a disproportionate impact, the law must be treated as if it made a classification based on gender on its face. Now, any law that classifies on the basis of gender on its face, under ERA, will be subject to the strict scrutiny test. I do not think it is going to be any different here. I think as a theoretician of the equal rights amendment that Professor Freedman is more accurate here. After all, the impact test is a way of showing that laws neutral on their face are, in fact, discriminatory. Any law which classifies on its face on the basis of gender will be subject to strict scrutiny, and I must simply assume that any law which has a disproportionate impact will be subject to the strict scrutiny test as well.

Senator HATCH. Professor Wegner, in your opinion, what would be the greater contribution of the ERA—the elevation of the intermediate scrutiny standard to a strict scrutiny standard, or the transformation of the intent test for defining discrimination to an effects test.

Would the ERA be nearly as important a reform if either of these constitutional contributions were absent?

Professor WEGNER. I think they are both very important contributions. I hesitate to say which is more important. I think I would have to say in my mind, they are equally important.

Senator HATCH. They are equally important.

Professor Barbara Brown, as you know, a leading scholar of the equal rights amendment, has stated in her textbooks on women's rights that the Supreme Court's holding in *Washington* v. *Davis*, applying the intent test to the 14th amendment "will not be an appropriate standard under the ERA."

Professor Wegner, do you agree with Professor Brown's observation on the applicability of *Washington* v. *Davis?*

Professor WEGNER. Yes; I think we are dealing with a different amendment with a different legislative history, and I think that it well may be the case that the courts would recognize, in the light of that unique history and context, that there should be an application of an impact standard.

Senator HATCH. Well, could each of you define for the record how you interpret *Washington* v. *Davis?*

Professor WEGNER. *Washington* v. *Davis* held that as far as racial discrimination was involved under the equal protection clause, that only intentional racial discrimination would trigger a compelling interest test under strict scrutiny.

Senator HATCH. Do you agree?

Professor ERLER. There, the court specifically rejected the disproportionate impact test of racial discrimination, noting that without some showing of a purpose or intention to discriminate, the equal protection clause did not protect against that kind of discrimination.

Senator HATCH. Professor Wegner, I am a little bit confused here. If I understand you correctly, you are saying that despite the fact that the 14th amendment and the equal rights amendment use extremely similar language, the Supreme Court holding in the

Washington v. *Davis* case, defining what constitutes discrimination under the 14th *amendment, will not be applicable to the equal* rights amendment.

Professor **Wegner**. Yes.

Senator **Hatch**. How can this be so? Isn't there a presumption that similar language, whenever it is used in the Constitution, means something similar?

Professor **Wegner**. Senator, as I said in my written testimony, I think there is definitely a question of construction here. I think that an argument can be made that first, because of the similarity in language, and second, because of the evidence of congressional intent to extend to gender the protections currently afforded race under the 14th amendment, that then an intent standard might be said to be incorporated within the ERA.

I would say on balance, though, my view is that the better construction would be to take into account the full legislative history of the equal rights amendment, as the court will do, looking beyond the literal language of the amendment itself, and in light of hearings such as this one and statements in that Yale article and so on, that there is sufficient evidence to indicate that an impact standard should be applied here. I think the court will look at the ERA on its own terms.

Senator **Hatch**. Assume that the ERA has been ratified, Professor Wegner, as part of the Constitution. And assume that a municipal police department offers an employment examination along the line of the examination which was involved in the *Washington* v. *Davis* case. Assume that as in that case, there is no evidence whatsoever of purposeful discrimination. Assume also that not only do black applicants fare poorly in the exam, as in the *Davis* case, but that women applicants fare equally poorly in the examination.

Now, am I correct that the black applicants would continue to be unable to litigate a 14th amendment claim because of *Davis*, but that the female applicants could litigate an equal rights amendment claim?

In other words, the women applicants could claim discrimination, but the black applicants could not, if the equal rights amendment were passed.

Professor **Wegner**. I am glad you asked that question, Senator, because something that Mr. Erler said rose in my mind to touch on that point as well. Yes, in short. But I think the committee has to bear in mind that they are dealing with a particular problem here—that is, the problem of gender discrimination—and I think the committee should not hesitate to fully redress that problem, despite the fact that the problem in the context of racial discrimination may not have been fully answered, at least in some people's view, to their satisfaction in view of the *Washington* v. *Davis* case.

I think I would take issue in any event with the statement Professor Erler had made concerning the history of discrimination on the basis of gender. He said there had not been anything comparable to racial discrimination as far as unfortunate history of discrimination. And I would cite, for example, the *Bradwell* case, in which the Supreme Court had said that women could not be lawyers. I think that is just one small example of the kind of history of discrimination we have faced, something that the ERA is attempting to correct and I think needs to be addressed and fully addressed on its own terms.

Senator **Hatch**. But if I understand you correctly, Professor Wegner, you are saying that the ERA will introduce into the Constitution a more rigorous standard for identifying sex discrimination than for identifying race discrimination.

Professor **Wegner**. You are using the term, "standard." I do not believe you are referring to the choice of scrutiny, but instead, to the zone of situations protected, and I would agree that indeed, impact would be addressed under the ERA, even though it has not been seen to be the trigger for enhanced scrutiny under the 14th amendment.

Senator **Hatch**. In other words, it would be a greater standard——

Professor **Wegner** [continuing]. With respect to race—a broader zone of protection; yes.

Senator **Hatch**. Professor Erler?

Professor **Erler**. Yes. As I said in my opening remarks, it does not make sense to me from any constitutional point of view that gender classifications will receive a higher level of scrutiny than racial classifications, and the remark about the *Bradwell* case, where the Court decided that the States could restrict women from becoming lawyers is hardly the *Dred Scott* case, where blacks of African ancestry were said to be ineligible for citizenship in the United States and that they could therefore not have civil or political rights of any kind. Again, I must say that the history of racial discrimination in the United States bears no analogy to the history of gender discrimination in the United States, nor do I think for the purposes of law does gender bear any analogy to race.

Senator **Hatch**. Do you agree with Professor Wegner's conclusion that if the equal rights amendment passes, that there would be a more rigorous standard vis-a-vis effect versus intent, in sex discrimination cases than in race discrimination cases?

Professor **Erler**. Yes, Senator. I do not think there would be any doubt about that. Gender classifications will have to meet a more strict test than racial classifications.

It is interesting that the ERA would overturn the *Washington* v. *Davis* case, but only with respect to gender classifications and not racial classifications.

Senator **Hatch**. Professor Wegner, in an earlier hearing on the matter of the ERA's impact upon Social Security, Jane Sherburne, a leading supporter of the ERA, argued that the disparate impact analysis would require substantial reforms of the Social Security system. Earlier, Dorothy Ridings, president of the League of Women Voters, argued that a wide variety of Government programs of financial support would have to be reformed to "eliminate any aspects which have a disproportionately negative impact on one's sex." Among the programs she alluded to were pension programs, Social Security, and welfare.

Now, in your opinion, would such economic programs be subject to the same constitutional analysis as other governmental actions and policies, particularly the effects test which you claim would be incorporated into the ERA?

Professor **Wegner**. Yes, they would be subject to the same analysis. I would have to say that that is such a broad question, without looking at the specific aspects of pension or other provisions that you are alluding to, that it is difficult to answer as far as precise outcomes. We have seen a series of cases litigated already, concerning situations in which there are requirements of dependency to be demonstrated by one sex or the other, things like that, that have already been struck down, so I think that is an ongoing process in any event.

Professor **Erler**. It is indeed an ongoing process, but I think that the passage of ERA, would radicalize that to an unbearable extreme.

Again, if we use impact analysis, whatever laws or governmental actions that have a disproportionate impact upon one gender would be subject to a heightened level of judicial scrutiny.

Senator **Hatch**. And to being stricken as unconstitutional.

Professor **Erler**. And being stricken as unconstitutional, that is true.

Whatever test you choose, whether it is the strict scrutiny test or the intermediate scrutiny test, many laws will have to give way under the ERA.

Professor **Wegner**. Again, I would simply cite the recent *Heckler* case which in fact upheld what Congress had done to try to remedy something precisely in the area of pensions.

Senator **Hatch**. But actually, wasn't that a transitional law?

Professor **Wegner**. It was, but to say that if something is indeed carefully tailored that it would be sustained seems to me that that demonstrates that to be the case.

Senator **Hatch**. Now, when we talk about the concept of disparate impact, are we referring to the concept in the context of men as a whole or women as a whole, or is it permissible to think of this concept as applied to subgroups of men or women?

To whom is it proper to apply the concept of disparate impact?

Professor **Wegner**. I think again, the notion is that disparate impact could be evidence of the use of a facially neutral classification which is, in fact, linked to gender, and that in my mind, that is referring to the overall class of women or men as a whole. I am not sure, again, if there is something behind your question more specifically—I might be more responsive.

Senator **Hatch**. Would you agree or disagree with Judith Sherburne, who recently testified on the relationship between the ERA and Social Security, and who appeared to argue that the amendment would be triggered by the fact that a particular subclass of women, homemaking women in this case, were disadvantaged by the ERA. Is this a proper approach in ERA analysis?

Professor **Wegner**. Again, I am not sure, without a specific context to put that in. I could imagine the application of a law that would severely affect women who happen to be homemakers, but I am not sure——

Senator **Hatch**. I think what I am saying is do you have to look to women as a class in order to trigger effects analysis, or can you look to subclasses of women—homemakers, for example?

Professor **Wegner**. I guess without the context to put that in, I think you would look to women as a whole, but if there is a severe adverse effect on a large proportion of them who happen to be homemakers, that that would perhaps give rise to this kind of an inquiry.

Professor **Erler**. Senator, I think that that is quite possible that the courts would look to various subgroups, homemakers, perhaps poor women, or whatever the case might happen to be. That would mean that laws that did not have a severe disproportionate impact on women as a class could nevertheless have a disproportionate impact on certain subgroups within the class of women.

I think that the court might very well use that analysis. And to clarify a remark made by Professor Wegner, the two most recent gender classifications to survive intermediate scrutiny—and the only two I know—Michael "M" and Heckler—were laws discriminating against men.

Senator **Hatch**. I would like to run through a hypothetical controversy in order to better understand the operation of the effects test.

Let us suppose that the ERA is ratified later this year as part of the Constitution. Let us further suppose that next year, the Congress decides that it wants to embark upon major tax reform and ultimately enacts, after a bitter legislative fight, a flat tax rate proposal, which sharply diminishes the progressivity of our present tax system.

Suppose that a civil rights organization, the Women's Equity Action League, for example, decides to challenge that action in Federal court. They argue that women as a class earn approximately 60 cents for every $1 earned by men as a class, and that a reduction in the progressivity of the tax system would naturally operate for the relative benefit of the class of male workers, and the relative detriment of the class of female workers.

Now, am I correct that the Women's Equity Action League, at that point would have overcome their initial burden and demonstrated that the flat tax proposal yielded a disparate impact upon women?

Professor **Wegner**. I suppose so. That is not something I have considered before. I think again, it is a matter of evidence. If that were shown to be the case for the overall class, it might be that it would be narrowed down in some way to one particular level of income and to women who are in some way affected by that.

Senator **Hatch**. But the court certainly would not grant summary judgment in that case?

Professor **Wegner**. No.

Senator **Hatch**. This would be litigation that could overrule the legislative judgment of the entire Congress of the United States.

Professor **Wegner**. I think I said that as far as the prima facie case, there would have to be careful evidentiary consideration. As far as ultimate justification, I would suspect that that would be withheld, in my best judgment.

Senator **Hatch**. But they would have to go to a fullblown trial, no matter what, on that issue?

Professor **Wegner**. I would suspect so.

Senator **Hatch**. And that is just one issue. I can think of countless ones like that.

Professor Erler?

Professor **Erler**. That is a good example, Senator. I think it is certainly true that the disproportionate impact of a nonprogressive tax, given the fact that women earn less money as a class, that that would establish prima facie evidence of gender discrimination.

Senator **Hatch**. That is just a hypothetical, but not a wholly unlikely one, because we are talking about a flat rate tax in Congress, which a lot of people think would be more fair than the present progressive tax.

Let me just suggest a few statutes that would have an arguably disparate impact similar to that particular hypothetical; veterans benefits; height and weight employment requirements; prostitution laws; rape laws; welfare benefits; Social Security laws; sales tax laws; comparable worth; occupational licensing; licensing—insurance practices; SAT and other academic testing policies; abortion laws; affirmative action policies, protective labor laws; draft registration; military personnel policy; pension programs; health insurance; research grants; athletics policies; domestic relations; property laws; divorce and custody laws; illegitimacy laws; seniority systems; wills and estates. All of those have a variety of issues that could be challenged in fullblown trials because of this so-called disparate impact test.

Do either of you disagree with that conclusion on my part?

I have only listed a few.

Professor **Wegner**. Senator, I would have to say that I think that once there began to be judicial interpretation and some decision as far as what are acceptable justifications, that the number of cases brought would probably settle down. I think it is well—you have touched upon a whole variety of areas, but there already is litigation in some of those areas dealing with facially discriminatory standards that have been modified by the statutes——

Senator **Hatch**. But would not the ERA shift the burden of proof to the Government to explain and justify its actions to Federal courts and judges. Don't you agree that that is what is going to happen if the ERA is passed and ratified?

Professor **Wegner**. Assuming that the initial level of proof is established, and assuming that someone is going to, in fact, challenge in court, then I think——

Senator **Hatch**. Sure.

Professor **Wegner** [contining]. That would be the Government's burden.

Senator **Hatch**. In other words, this burden is going to shift to the Government, assuming you can show any statistical justification under the disparate impact test. This presently is not our law.

Professor **Wegner**. And assuming, again, that that is the Government's burden; it is nevertheless not going to follow in every case that the Government would lose the case.

Senator **Hatch**. But there will be cases brought in every one of these areas: cases in which the burden will be shifted to the Government.

Professor **Wegner**. So your concern is litigation costs, then, or——

Senator **Hatch**. My concern is that the courts are going to decide all of these issues. In our initial hearing Senator Tsongas was very honest when he came out and acknowledged that the courts would decide. You seem to be saying the same thing: that if the plaintiff can meet the initial burden of proof of showing a significant statistical disparate impact, then that burden of proof shifts to the Government, and the Government is going to have to defend itself against constitutional violations. What I conclude from that is the courts are going to be in a position, if the equal rights amendment is passed, to be able to second-guess the judgment of the other two branches of Government as well as the States.

Professor **Wegner**. Senator, I think the courts in many instances have displayed their concern for separation of powers and that they still would be informed in their decisions by such fundamental principles.

Senator **Hatch**. But you agree that a tremendous amount of litigation would result.

Professor **Wegner**. I suspect that litigation could be brought, and I think that the courts would handle it in a reasonable fashion, as they attempt to do.

Senator **Hatch**. Well, depending upon whose point of view.

Go ahead.

Professor **Erler**. Well, Senator, I——

Senator **Hatch**. I personally have a great deal of difficulties with the courts deciding all these social and economic issues. That is not their proper role.

Now, that does not mean that everything that elected representatives of the people do is right, because the courts are always empowered to find acts of Congress unconstitutional. But, if the disparate impact test, or the results test, or the effects test—whatever you want to call it—becomes law because of the equal rights amendment, it would represent a radical change, in not only our legislative processes in this country, but in our judicial processes as well; it would open the door to massive amounts of litigation throughout society involving these very sensitive and difficult areas.

Professor **Erler**. Senator, I agree with you that the primary responsibility in constitutional government for making policy belongs with the legislative branch, the most representative branch of Government, and I think I share your concerns about courts today taking over more and more of the policymaking functions from the legislature, and I believe that the disparate impact standard that will be established by the ERA will force more of these policy issues into the courts, and it is not so much the volume of litigation that I worry about, but the fact that the ERA will establish prima facie cases regarding many of these laws you mentioned, and that many of the laws, if not a majority of those laws, will have to give way under the equal rights amendment.

Senator **Hatch**. I have a lot of respect for the Federal judiciary, but I also know that it becomes politicized from time to time. Congress granted almost 300 judges for President Carter to appoint several years ago. A lot of conservatives feel that those judges by and large are basically liberal, activist judges who would love to be able to employ the disparate impact test in "innovative" and "creative" ways. We now have a bankruptcy bill before both Houses of Congress. In that bill are 85 more judges. It is no secret that some do not want to create those judgeships because they do not want

Ronald Reagan appointing 85 judges. That is a pittance compared to Carter, but nevertheless, they do not want him appointing them, because they may be more moderate or conservative judges.

These judges are appointed subject only to their confirmation by the U.S. Senate. They are not elected. They are appointed by whoever is President, and he can appoint whatever ideological mix he desires. You can see why a lot of people simply do not want unelected and unaccountable judges deciding all these very difficult issues. And yet, the one thing I find consistently throughout these hearings is the willingness, by some, to leave these issues to the courts, and let the judicial elite decide. That is not to say that the Congress is right in everything it does—I know it is not—but at least you can turn us out of office if you do not like what we do or stand for. You at least have that ballot box opportunity to say that we do not like what is going on in Congress. You do not have that with lifetime-tenured judges. That is the nub of the problem that some of us have with the ERA.

I want to compliment both of you. I think both of you have been as articulate as any other pair of witnesses that we have had in these equal rights amendment hearings.

Professor Wegner, there is no question you are an authority in this area, and I have great respect for you.

We have had you before this committee before, Professor Erler, and we have deep respect for you.

I would hope you would both be willing to come back and help us on other constitutional issues as they arise through the years.

I just want to personally congratulate both of you for the excellent statements you have made. You have helped this committee come to a better understanding of this very difficult and complex issue. I certainly understand your respective points of view and respect both of you for them.

We will recess the hearing until our next hearing which will be on May 23. We will then consider the impact of the ERA on homosexual rights.

So with that, thank you both for coming, and we will recess until further notice.

[Whereupon, at 11:23 a.m., the subcommittee was adjourned, subject to the call of the Chair.].

[The following material was subsequently supplied for the record.]

Miscellaneous Material

[From the Wall Street Journal, Jan. 25, 1984]

Constitution Isn't Place for Remediation of Bias

(By Carol Tyler)

I am a wife, the mother of two and consider myself a feminist. I have consistently supported the Equal Rights Amendment. In recent months, however, I have begun to wonder whether the ERA, which many in the women's movement endorse, would grant women constitutional rights that do not exist for blacks and other "protected classes."

To my mind, equality is achieved through the absence of discrimination. How we define discrimination therefore becomes critically important. The Supreme Court has always defined it under the equal protection clause of the 14th Amendment as a federal or state action that *intentionally* creates classifications based upon race, religion, color or national origin. What feminist leaders seem to want is a constitutional amendment that would reach far beyond the 14th Amendment by erasing laws that have the *effect* of treating women differently from men.

Last November, the House of Representatives failed in its rather hasty attempt to bring the ERA up for a vote and send it to the Senate in time for the 1984 elections. Neither the hearing record nor the committee report has been released, so we are left only with the words of the amendment's chief advocates to explain its otherwise simple language.

Rep. Geraldine Ferraro (D., N.Y.) was unequivocal. The ERA, she said, not only would strike laws that intentionally discriminate against women, but would also lead to challenges of "sex-neutral" laws that "disproportionately impact" on women. Similarly, Judy Goldsmith, president of the National Organization for Women, has tried to justify a constitutional effects test by saying an intent test, which has formed the basis for every successful equal protection claim brought under the 14th Amendment, is "often impossible" to prove. Rep. Patricia Schroeder (D., Colo.), one of the principal sponsors of the amendment, has played down the efforts to define the ERA by saying simply that its adoption would establish "equal rights" and that "everybody in America knows what that means."

It has been only within the past 25 years that blacks have begun to receive the kind of equality that was envisioned for them when the 14th Amendment was ratified in 1868. They, along with religious and ethnic minorities, have since become clothed in an interpretation of the equal protection clause that places all intentional classifications against them under strict scrutiny by a reviewing court.

Since intent clearly can be established by indirect proof, as it has often been in school busing cases in the North, any such classification is, then, subject to a two-stage analysis: It must make a deliberate distinction on the basis of race, religion, color or national origin, and there must be no "compelling and overriding state interest" to justify its retention. Today, despite great strides brought about in part through the national debate over ERA 12 years ago, gender-based distinctions still have not acquired this same level of constitutional protection.

When the ERA passed the Senate Judiciary Committee in 1972, Sen. Birch Bayh (D., Ind.) suggested that if the court upgraded the constitutional status of women then "part of the reason for the amendment would disappear." At that time, distinctions that laws made between men and women were not subject to the "compelling and overriding state-interest" test, and inequities were therefore far more widespread and obvious. But over the years, the constitutional status of women under the equal protection clause has gradually improved.

The most recent test was advanced in 1982 by the first woman to sit on the Supreme Court. In Mississippi University for Women vs. Hogan, Justice Sandra Day O'Connor wrote that distinctions based on gender may be approved *only* by establishing "an exceedingly persuasive justification" for their use. This sounds a great deal like a requirement for a "compelling and overriding state interest," but the semantic difference seems designed to enable the courts to continue certain unidentified distinctions based on sex that it cannot maintain with regard to race, religion, color or national origin.

Earlier, in 1976, the court reiterated its longstanding view that intent is a prerequisite for relief under a 14th Amendment claim of discrimination. In Washington vs. Davis, an employment test of the District of Columbia Police Department was challenged as unconstitutional because a greater proportion of blacks failed than did whites. The court responded by once more holding that disproportionate impact, or "effects," is not a violation of the equal protection clause. What Rep. Ferraro and Ms. Goldsmith have made clear is that they want the ERA to reverse Washington vs. Davis when women are involved.

I have always considered legislation as remedial in nature. It is created by Congress to meet a specific need and, when it meets that need, it will be ripe for repeal. By contrast, the Constitution is written in indelible ink and, while it grows with us through judicial interpretation, it forever serves to underscore our democratic devotion to broad rights and privileges.

When necessary, Congress has stepped in and expanded the role of the federal government through legislation aimed at specific problems; it has, from time to time, also created an effects test as part of that legislation. An effects test, for example, has been incorporated into the fair housing provisions of Title VIII of the Civil Rights Acts, and the language of Title VII has been broadened to set up affirmative action procedures based on "goals and timetables." In 1982, Congress adopted a new effects test as part of the Voting Rights Act. What is important is that the effects test has always been part of legislative remedies. Neither Congress nor the Supreme Court has ever endorsed an effects test as protection from discrimination under the 14th Amendment. NOW's interpretation of the ERA would set that precedent, but for women only.

The issue may be revived in this session of the House. Any ERA that passes Congress should grant rights that are no less—and no more—pervasive than those available to others victimized by discrimination. The Constitution and the ERA are too important to be abused on behalf of individuals who wish to prosper from the politics of group, as opposed to individual, rights. There is no justification for providing women with a level of permanent protection under—the Constitution that does not, and never has, existed for anyone else.

JAN 20 1976

A COMMENTARY ON THE EFFECT OF THE EQUAL RIGHTS AMENDMENT ON STATE LAWS AND INSTITUTIONS

prepared for

The California Commission on the Status of Women's
Equal Rights Amendment Project

by

Anne K. Bingaman

Anita Miller, Project Director; 926 J Street, Suite 1014;
Sacramento, California 95814

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STATUTES WHICH ARE "NEUTRAL ON THEIR FACE BUT DISCRIMINATORY IN IMPACT"

It may be said generally that statutes which are drawn in terms of sex will be absolutely prohibited after passage of the Equal Rights Amendment. Thus, statutes such as the now unconstitutional jury selection laws which explicitly required all males to serve, but automatically exempted all females, also would have been invalidated by the Equal Rights Amendment. The following chapters in this Commentary are concerned largely with the analysis of statutes which are expressly drafted and applicable according to sex.

There are two exceptions to the principle of absolute prohibition of classifications based on sex. The first is the right of privacy qualification, discussed in the next section; that right will permit either statutes or governmental institutions to make distinctions based solely on sex where necessary to preserve an individual's right to personal privacy in matters relating to bodily functions. The second exception involves the "unique physical characteristics" test, discussed separately below, That test will, in certain narrowly defined circumstances, permit laws to apply by their terms to one sex alone if those laws deal with the necessary result of physical characteristics found in only one sex.

Aside from the relatively limited situations which will satisfy either the right of privacy qualification to the Amendment or the "unique physical characteristics" test, all statutes or other forms of state action subject to the Amendment must be completely sex-neutral. Thus, the Amendment will allow statutes to be drafted and governmental actions to be taken according to functions performed by persons of either sex, but not by explicit reference to sex itself. Under this principle, regulations of school districts or government agencies which prescribed leaves of a specified duration for childrearing, a function which could be performed by either sex, would have to be drafted in completely sex-neutral terms so that leave would be available to males and females alike.

In some instances, however, laws which are drafted in completely sex-neutral terms may, in particular circumstances, bear more heavily on one sex than upon the other. Such laws are described throughout this Commentary as laws "neutral on their face, but discriminatory in impact." One of many possible examples of a seemingly sex-neutral rule which would weigh more heavily on one sex than on the other would be a high school's maintenance of only one team in each sport fielded by the school, with participation on each team limited to 20 persons. In a high school of 2,000 students, which had 10 athletic teams limited to 20 persons each, it is obvious that women students, because of their smaller size and limited athletic training, would be effectively precluded from participating in the state-sponsored athletic program of that school. Such a school rule, although sex-neutral by its terms, would in fact discriminate against the right of women students to participate in high school athletics on an equal basis with men. Thus, this hypothetical rule is an example of one which is "neutral on its face, but discriminatory in impact."[18]

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[18] Supreme Court cases which have held statutes unconstitutional under the fourteenth amendment as laws "neutral on their face, but discriminatory in impact" include: Gaston County v. United States, 395 U.S. 285 (1969); Lane v. Wilson, 307 U.S. 268 (1939); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Green v. County School Board, 391 U.S. 430 (1968); United States v. Jefferson County Board of Education, 372 F. 2d 836 (5th Cir. 1966), cert. denied, 389 U.S. 840 (1967); Sherbert v. Verner, 374 U.S. 398 (1963).

In Griggs v. Duke Power Co., 401 U.S. 242 (1971), the Court held that Title VII prohibited an employer from imposing a test for certain jobs where the employer could not demonstrate that the test was related to skills needed for the job and the test had a disportionate impact on blacks. In such a setting, the Court said, the test was "neutral on its face, but discriminatory in impact" and therefore violated the prohibition against racial discrimination in employment contained in Title VII.

Another example of such a rule is the imposition by state statutes of criminal penalties for nonpayment of child support. While such a rule is sex-neutral by its terms, in fact, in 95% of the cases women are given custody of children, with men usually ordered to pay child support. Thus, a statute which provides criminal penalties and imprisonment for failure to pay child support bears much more heavily on men than upon women, and as such must be strictly scrutinized as a law "neutral on its face, but discriminatory in impact." Throughout this analysis, repeated reference will be made to such laws or rules. The concept is essential to implement fully the Equal Rights Amendment.

It should be noted, however, that in a recent case the United States Supreme Court cast doubt upon whether this interpretation of the Amendment, put forward in 1971 by the authors of the Yale article, will be accepted by the Court. In Jefferson v. Hackney, 406 U.S. 535 (1974), the Court refused to recognize as "neutral on their face, but discriminatory in impact" laws which demonstrably affected persons of whom nearly 90% were Mexican-American or black and of whom less than 15% were Anglo-Saxon; the Court said that mere percentages will not serve to trigger use of the strict scrutiny test under equal protection.

If this recent case is extended in later cases, it is possible that the analysis presented in this Commentary of laws "neutral on their face, but discriminatory in impact" will not be accepted by the Supreme Court. In order to provide a view of the most far-reaching effects the Amendment could possibly have--while recognizing that the Supreme Court may interpret the Amendment less broadly than its language and history would permit--this analysis has assumed that statutes and regulations "neutral on their face, but discriminatory in impact" will be unconstitutional under the Equal Rights Amendment. However, only subsequent litigation under the fourteenth amendment and under the Equal Rights Amendment after its passage can finally determine the scope of the doctrine.

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THE IMPACT OF THE EQUAL RIGHTS AMENDMENT: HOMOSEXUAL RIGHTS

WEDNESDAY, MAY 23, 1984

U.S. Senate,
Subcommittee on the Constitution,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, in room SD-562, Dirksen Building, commencing at 9:30 a.m., Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Staff present: Dick Bowman, Committee on the Judiciary; and Stephen J. Markman, chief counsel; Carol Epps, chief clerk; and Leslie Leap, clerk, of the Subcommittee on the Constitution.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator Hatch. Ladies and gentlemen, this marks the eighth day of hearings by the Subcommittee on the Constitution on the meaning and the impact of the proposed equal rights amendment.

The purpose of these hearings is to establish a complete and thorough legislative history on the meaning of the 52 words of this highly controversial measure.

Earlier hearings by the subcommittee have focused on such topics as the impact of the ERA upon Social Security, military policy, private education, veterans' programs, and abortion, as well as the constitutional and definitional issues involved with the amendment.

Today's hearing will focus upon a particularly charged issue involved in the ERA debate: Its impact on homosexual rights.

While many commentators of the equal rights amendment believe that it will have no significant impact upon homosexual rights per se, others, including both proponents and opponents of the amendment, believe that it may have substantial implications for such policy.

Prof. Paul Freund of the Harvard Law School has said:

> Following ratification of the ERA, if the law must be as indiscriminating toward sex as toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws preventing miscegenation.

Similarly, Prof. Barbara Babcock, a proponent of the ERA and author of perhaps the leading academic text on women's rights has remarked on the same issue:

> The effect that the ERA will have on discrimination against homosexuals is not clear. It is hard to justify a distinction between discrimination on the basis of the sex of one's sexual partners and other sex-based discrimination.

Ladies and gentlemen, I am well aware that this subcommittee can be accused of sensationalism in conducting today's hearings. I would simply point out that in attempting to establish a comprehensive record on the meaning of the ERA, we have touched upon both controversial and relatively dry and arcane subject matters. Like it or not, it is apparently the case that the ERA cannot fully be understood in the absence of serious and scholarly academic exploration of the pending issue.

In order to help establish a record on this matter, we have with us today two outstanding scholars of the Constitution.

Our first witness will be Prof. Raymond Marcin, professor of law at the Catholic University School of Law and former staff counsel of the Connecticut Commission on Human Rights.

Following him will be Prof. Eugene Hickok, professor of government at Dickinson College and founder of the Center for the Study of the Constitution at Dickinson College.

We appreciate both of you being with us as we discuss this very difficult subject matter.

I would note for the record that a substantial number of homosexual and pro-ERA organizations were invited to contribute witnesses on this subject and they all declined. I am sorry that they believe that silence on this issue is the best way to deal with the serious questions that surround the ERA in this area. I personally believe that they could have added a lot to this hearing and we of course have tried throughout these hearings to hear from the top constitutional experts on both sides of the issue.

Let me emphasize that the purpose of this morning's hearing is not to engage ourselves in the question of homosexual rights generally or in the merits or demerits of homosexual rights. That we will leave to others.

The sole purpose of this hearing is to consider the question of how the ERA will affect public policy in this particular area. We are not here to make value judgments, but simply to resolve the question of how public policy in this country will be altered by the proposed amendment.

We feel particularly happy to have these two distinguished individuals, both of whom are experts in constitutional law. We appreciate both of you being here for this particular discussion.

Why do we not begin then with Professor Marcin and then we will turn to Professor Hickok and go from there.

STATEMENTS OF PROF. RAYMOND MARCIN, CATHOLIC UNIVERSITY SCHOOL OF LAW, ACCOMPANIED BY PROF. EUGENE W. HICKOK JR., DICKINSON COLLEGE

Mr. MARCIN. Thank you, Mr. Chairman. It is an honor to be here even though the subject of today's hearing is controversial, sensitive, and difficult.

Answers to questions of constitutional meaning are not easy to come by. Oliver Wendell Holmes around the turn of the century wrote an article in the Harvard Law Review, called The Path of the Law, in which he said that law is nothing but a prediction of what judges will say it is. And that article signaled a distinctly American legal philosophy. We call it American realism. And my view for some time has been that Holmes' philsophy of realism is perhaps the best approach to assigning meaning to constitutional provisions. There are two modern and contemporary scholars, whom I regard as special proponents of Holmes' American realism with regard to constitutional interpretation. One is Alexander Bickel, late professor at Yale Law School; the other being John Hart Ely, professor, formerly at Harvard, now dean at Stanford.

One is tempted to simplify the matter by focusing on one central question connected with this topic of the impact of the ERA on the rights of homosexual citizens. One is tempted to ask a simple question like: Does the proposed amendment render unconstitutional all statutory prohibitions against same-sex marriages? It is a simple question.

But one is mindful of the late Alexander Bickel's cryptic warning about inquiring into the meaning of constitutional provisions. He said:

"No answer is what the wrong question begets."

Asking whether the ERA mandates recognition of same-sex marriages is indeed the wrong question. And so it beget no answer. But in these remarks, I am going to ask that question and I am going to try to answer it knowing full well that it is the wrong question. And consequently my efforts will lead to no answer. I am going to do this not because of caprice or vagary, but because it is sometimes necessary to think through the wrong question in order to arrive at the right question

John Hart Ely once made an observation about Alexander Bickel's career that seemed almost disparaging. He wrote that Bickel's career testifies to the inevitable futility of trying to answer the wrong question. He did not mean any disparagement, however. In the same paragraph he also declared that Bickel was probably the most creative constitutional theorist of the past 20 years. And so there is a paradox.

The futility of trying to answer the wrong question begets both creative constitutional theory and no answer. Let us look at the paradox.

Does the proposed ERA render unconstitutional all statutory prohibitions against same-sex marriages? If approved, the ERA becomes of course a constitutional provision, and a constitutional provision is legislation in the wide sense. There is more than one way to find a meaning of legislative language

First, one is tempted to look at the language itself, the meanings of the words used. It is easy to look at the words themselves and to conclude that a man who wishes to marry a man or a woman who wishes to marry a woman but cannot do so because of a statute prohibiting same-sex marriages is deprived of equality of rights because of his or her sex. The simple truth is that were he or she of the opposite sex the prohibition would not apply. This literal interpretation is easy and attractive and may be thought of as a focal point of those who would use the celebrated precedent of *Loving* v. *Virginia* as their argument. In the *Loving* case, the Supreme Court held that a black woman and a white man were deprived of equality of rights on account of race by Virginia's statute prohibiting interracial marriages.

Simplistically, it might be argued that one can simply change the names and the category of discrimination and there you have it. We have every reason to believe that that will be the very opinion the Supreme Court will write on the matter in question. I believe this is the gist of the position taken by two student authors of a 1973 Yale Law Journal article on "The Legality of Homosexual Marriage." Their position is more varied and more thorough than that. But the basic gist of it is a reliance on the *Loving* v. *Virginia* case and the analogy between the ERA and the equal protection clause.

But if we are going to take a literalist's approach to this, then we have to be consistent, we have to look not only at the literal meaning of the words used in the ERA but at the literal meaning of the words used in our question.

We ask about same-sex marriage. What is marriage? Has the word marriage ever meant anything other than the legal union of one man with one woman? By literal definition, marriage has been a heterosexual institution When we apply this literalist approach to our question, we reach the result reached by the Court of Appeals of the State of Washington in the *Singer* v. *Hara* case in 1974, that a statutory prohibition against same-sex marriages—that court held—does not violate the State of Washington's ERA. It distinguished the *Loving* case as focusing on a racial classification, whereas in the case of homosexual marriage and the ERA, we are focusing more on a definition of marriage.

If we stay on this semantic, definitional, literal level we are left with a chicken or egg type of quandary. Does the heretofore accepted definition of marriage inform the meaning of the ERA, or does the language of the ERA inform the meaning of marriage? I would submit that anyone's answer to this question is as good as anyone else's. And that is the difficulty that we come up against when we take an excessively literal approach to the meaning of a legislative language.

A literal approach is no answer to the wrong question. It does not lead us anywhere.

One is next tempted to look beyond the literal words and one is impressed with a statement that Justice Oliver Wendell Holmes made many years ago:

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

We might try Holmes' idea and look for the living thought behind the words of the ERA. To put it differently, we might look for the legislative intent behind the words of the ERA. What is the living thought of this Congress as to the meaning of the ERA on the particular point in question? What is or will be the living thought of each of the State legislatures that will be asked to approve the ERA? They are lawmakers in this setting also. One may go further. What is the living thought of each of the thousands of legislators in Congress or the State legislatures who are now passing on or will be passing on the ERA? If we interpret Holmes' living thought idea as the actual, specific, intentional, mental position on the specific question and issue, we are led into a cacophony.

Perhaps we can look not to individual thoughts but to a corporate living thought, evidences in the legislative history of the ERA as to what it means in the context of same-sex marriages, evidences to which we may presume assent on the part of the individuals who vote to approve the amendment.

When we interpret statutes as opposed to constitutional language, we like this idea of looking for evidences of legislative intent. This phenomenon has even sparked the somewhat facetious—but not entirely so—observation among Canadian lawyers that Americans do not really look at the text of a statute unless they find ambiguity in the legislative history materials.

But as accepting as we are of the evidences of legislative intent approach in interpreting statutes, the question is: Is it a fitting approach for interpreting constitutional language? The answer is: Sometimes yes, sometimes no.

Alexander Bickel once pointed out that if legislative intent is the guide to the correct meaning of all constitutional provisions, then we would probably have to jettison *Brown* v. *Board of Education* and a good many of our Bill of Rights decisions.

Perhaps what I am saying seems too obvious. We are all familiar with Chief Justice Marshall's epithet:

"We must never forget that it is a Constitution we are expounding." Whether we like it or not, a Constitution changes in meaning; its meaning evolves over the generations. So it is again, we find that we have been asking the wrong question. The question is not: What does a constitutional provision mean? When we are dealing with a proposed constitutional provision as general and as forward-looking as the ERA, we ask that question only at the risk of getting no answer at all.

Professor Bickel may have hinted at the proper way to approach a problem like this when he said:

> It is not true that the framers intended the 14th amendment to outlaw segregation or to make applicable to the States all restrictions on Government that may be evolved under the Bill of Rights. But they did not foreclose such policies and may indeed have invited them.

So we might in this context of the ERA and the rights of homosexual citizens, specifically rights with respect to marriage, ask the question that Professor Bickel pointed towards: What policies are the framers of ERA not foreclosing? What policies are the framers inviting?

The answers depend largely upon what policies with respect to marriage and rights have been evolving in the past decisions of the Supreme Court. A proposed constitutional guarantee as broadly worded as ERA is not a self-contained entity. It is going to take its place against a background of already evolved and still evolving understandings of social and constitutional concepts. And it is in this evolved and evolving constititional and social background that we are most likely to find answers to the questions of what policies the framers of the ERA are inviting and what policies they are not foreclosing.

First, what is the evolved and evolving constitutional background in the context of the institution of marriage? Traditional understandings of the definition of marriage as the legal union between one man and one woman were strongly upheld in the past. For example, the old *Reynolds* v. *United States* decision, upheld the traditional definition of marriage, i.e., the monogamous marriage, in the face of a challenge based on the claimed constitutional right to freely exercise one's religion when that religion demanded polygamy. But one would be tempted to regard the *Reynolds* case as at best shaky evidence of the constitutional background understanding of marriage. It is an old case, over 100 years old.

That temptation, however, has to take into account more recent pronouncements, especially of Justice Douglas writing in the *Griswold* case scarcely 20 years ago. Douglas said:

> We deal with a right of privacy older than the Bill of Rights, older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring and intimate to the degree of being sacred. The association promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Both *Reynolds* and *Griswold* seem to uphold the argument that constitutional provisions impacting on the institution of marriage are understood as impacting on the traditionally defined concept of marriage.

But—there is always a but—just as our scientific understandings of the universe and the atom have evolved at a dizzying pace within the last 20 years, so too has a similar phenomenon occurred with respect to our social and constitutional understandings of institutions. The *Griswold* stress on the privacy rights of the married couple lasted but 7 years. Justice Brennan, writing for the majority in the 1972 *Eisenstadt* case said of the *Griswold* stress on the traditional-couple understanding of marriage and of the idea of how fundamental constitutional rights impact on that couple's understanding of marriage.

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusions.

In form, all the *Eisenstadt* case did was to extend the *Griswold* privacy right to nonmarried persons. But in emphasis it signaled a new understanding of marriage in the background of constitutional rights. The emphasis shifts from that couple understanding, the traditional understanding in *Reynolds* and *Griswold* to the individual understanding in both Eisenstadt and newer contemporary cases. It is the individuals who have the rights.

Senator HATCH. I think that is a very interesting interpretation. I have to admit, having read the *Eisenstadt* case I did not conclude that but I can certainly follow your line of reasoning. Very, very interesting.

I am sorry to interrupt you.

Mr. MARCIN. Thank you, Senator Hatch.

The *Eisenstadt* focus on the individual continued in the *Zablocki* case. Where in the past marriage had been considered the fundamental right—the old *Skinner* case in the 1940's had said marriage is one of the basic civil rights of man, fundamental to our very existence and survival—the *Zablocki* case focused not so much on the fundamental right of marriage but on the fundamental right to marry and hence we have a thesis developing: the right belongs to the individual and the right is no longer a right in marriage as a status, it is a right to marry.

Planned Parenthood v. *Danforth* got us further away from that couple understanding, that is, the status understanding of marriage when it prohibited States from permitting husbands to have an equal say in the abortion decision. The right is that of an individual, even in the marriage context—even against the marriage context.

My point is to suggest that the Supreme Court's understanding of marriage has changed. It is no longer exclusively the old, traditional definition of a status, a covenant upon which the survival of the human race is grounded. It seems more like an important contract right. It is this understanding that is going to provide the background against which the ERA is going to be superimposed.

Another part of the background onto which the proposed ERA will be superimposed is the Supreme Court's understanding of what it is that is at the heart of what is wrong about discrimination on account of sex. In case after case—we need not recite them—the Supreme Court's focus has been not simply on a technical act of discrimination but on a deeper, root concept: ancient canards, stereotypes, outmoded ways of thinking about the roles of men and women. In dealing with sex-discrimination problems those concepts have again and again been the focal point of the Supreme Court. And certainly the ERA focus is not going to be different.

Failure to recognize this is, I believe the flaw in the *Singer* decision. The Court in *Singer* mentioned its belief that at the heart of Washington's ERA is the slogan: Equal pay for equal work. That is of course an important equal-rights concept in sex-discrimination situations. But I hope it does not take an extensive brief to justify the suggestion that what lies at the heart of the proposed Federal ERA is something much more complex, far deeper than the notion of bringing the wages of women up to par. There is a great social movement going on and it is geographically more extensive and it is demographically more pervasive even than the movement for racial equality. It affects every human being and it involves the roles of men and women in society. It involves changing traditions, rooting out and rejecting ancient generalizations.

I suggested that the proper question might be Professor Bickel's questions: What policies are the framers of the ERA not foreclosing? What policies are they inviting? My own conclusion against the background of contemporary social and constitutional understandings of marriage and sex discrimination is that the ERA invites the new, less traditional, individuated concept of marriage, the right to marry, not so much the rights in marriage.

Moreover, the ERA invites not a simple reexamination but rather a rejection of ancient generalizations about sex, sex roles and rights in general in the context of sex. If marriage in its constitutional understanding is becoming less status and more individual contract, and is thus separating from the traditions that are the underpinning of the status concept of marriage, and if ancient canards about sex roles are at the heart of what the ERA rejects, then it cannot by any fair account be asserted that the framers of the ERA are foreclosing a policy of mandated recognition of same-sex marriages.

Thank you, Mr. Chairman.

[The following was received for the record:]

THE IMPACT OF THE E.R.A. UPON HOMOSEXUAL RIGHTS

Statement of

Raymond B. Marcin, Professor of Law
The Catholic University of America

before the

Senate Judiciary Subcommittee on the Constitution

May 23, 1984

> Equality of rights under the law
> shall not be denied or abridged
> by the United States or by any
> State on account of sex.

The subject of today's hearing--the impact of the proposed Equal Rights Amendment upon the rights of homosexual citizens--is controversial, sensitive, and difficult. One is tempted to simplify the matter by focusing on one central question connected with that topic: Does the proposed amendment render unconstitutional all statutory prohibitions against same-sex marriages? But one is mindful of the late Alexander Bickel's cryptic warning about inquiring into the meaning of constitutional provisions: "No answer is what the wrong question begets."[2] Asking whether the E.R.A. mandates that same-sex marriages be permitted _is_ the wrong question. And it begets _no_ answer.

In these remarks, I'm going to ask that question, nonetheless, and I'm going to try to answer it, knowing full well that it's the _wrong_ question and that consequently my efforts will beget _no_ answer. I'm going to perform this futility, not out of caprice or vagary, but because it's sometimes necessary to think the wrong question through in order to arrive at the right question. John Hart Ely, whose respect for Alexander Bickel is obvious in his writings, once made an observation about Bickel's career that seems almost disparaging. Bickel's "career," wrote Ely, "... testifies to the inevitable futility of trying to answer the wrong question."[2] Ely meant no disparagement. In the same paragraph he also declared that Bickel "was probably the most creative constitutional theorist of the past twenty years."[3] Thus the paradox: The futility--the "inevitable" futility--of trying to answer the wrong question somehow begets creative constitutional theory, and at the same time somehow begets _no_ answer.

Does the proposed E.R.A. render unconstitutional all statutory prohibitions against same-sex marriages? The proposed E.R.A., if approved, becomes legislation, and there is more than one way to find the meaning of legislative language. One is tempted, first, to look at the language itself, at the meanings of the words used. It's easy to look at the words themselves and to conclude that a man who wishes to marry a man, or a woman who wishes to marry a woman, but who cannot do so because of a statute prohibiting same-sex marriages _is_ deprived of equality of rights because of his or her sex. Were he or she of the opposite sex the prohibition would not apply. This literal interpretation is easy and attractive and may be thought of as the focal point of those who would use _Loving v. Virginia_[4] as a precedent. In _Loving_, the Supreme Court held that a black woman and a white man were deprived of equality of rights on account of race by Virginia's statute prohibiting interracial marriages. Simplistically, it might be argued that one can simply change the names and the category of discrimination and _viola_! We have what we have every reason to believe will be the very opinion the Supreme Court will write on the matter in question. This is, I believe, the gist of the position taken by two student authors of a 1973 Yale Law Journal article on THE LEGALITY OF HOMOSEXUAL MARRIAGE.[5] Admittedly their analysis was more thorough and more varied, but their basic position was that _Loving_ provides the framework for the decision on the question.

But if we're going to take a literalist's approach, then we must be consistent. We must look not only at the literal meaning of the words used in the E.R.A., but also at the literal meaning of the words used in our question. We ask about same-sex marriages. What is a "marriage"? Has the word "marriage" ever meant other than the legal union of one man and one woman? Marriage, by literal definition, is a heterosexual institution. When we apply this literalist's approach to our *question*, we reach the result reached by the Court of Appeals of the State of Washington in the *Singer v. Hara* case[6] in 1974, i.e., that a statutory prohibition against same-sex marriages does not violate an E.R.A. Washington's Court of Appeals said:

> In *Loving*... the parties were barred from entering into the marriage relationship because of an impermissible racial classification. There is no analogous sexual classification involved in the instant case because appellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex.[7]

If we stay on this sematic, definitional, literal level, we're left with a chicken-or-egg type of quandry. Does the heretofore accepted definition of "marriage" inform the meaning of the E.R.A., or does the language of the E.R.A. inform the meaning of "marriage"? I'd submit that anyone's answer to that question is as good as anyone else's.

No The literal approach is: "no answer to the wrong question." One is next tempted to look *beyond* literal words, and one is immediately impressed with a statement Justice Holmes made many years ago:

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.[8]

What *is* the living thought of this Congress as to the meaning of the E.R.A. on the particular point in question? What is, or will be, the living thought of each of the state legislatures which vote to ratify the E.R.A.? What is the living thought of each of the thousands of legislators who are now or will be passing on the E.R.A.? If we interpret Holmes's "living thought" as an actual, specific, intentional, mental position on the question at issue, we're led into an absurd cacophony. Perhaps we can look not to individual living thoughts, but to a *corporate* living thought, evidences in the legislative history of the E.R.A. as to what it means in the context of same-sex marriages, evidences to which we can *presume* assent on the part of the individuals who vote to approve the amendment.

We *like* to look for evidences of legislative intent in interpreting *statutory* language. We in America are so enamored of legislative-history materials that we've sparked the only partially facetious observation among Canadian lawyers that Americans don't look at the text of a statute unless they find ambiguity in the legislative-history materials. But as accepting as we are of the evidences-of-legislative-intent approacn in interpreting *statutes*, is it a fitting approach for interpreting constitutional provisions? The answer is: sometimes, but not always. It was Alexander Bickel who pointed out that if legislative intent is the guide to the correct meaning of all constitutional provisions, then we'd probably have to jettison *Brown v. Board of Education* and a good many of our Bill of Rights' decisions. Perhaps what I'm saying seems too obvious. We're all familiar with Chief Justice Marshall's epithet: WE MUST NEVER FORGET THAT IT IS *A* *CONSTITUTION* WE ARE EXPOUNDING. Whether we like it or not, the meaning of a constitituional provision evolves. And so it is that we've been asking the wrong question. The question isn't what does a constitutional provision mean? or even what is a constitutional provision likely to be interpreted to mean? When dealing with a proposed constitutional provision as general and as forward-looking or the E.R.A., we ask those questions only at the risk of getting no answer at all. Bickel may have hinted at the proper way to approach a problem like this when he said:

> It is *not* true that the Framers intended the *Fourteenth* Amendment to outlaw segregation or to make applicable to the states all restrictions on government that may be evolved under the Bill of Rights; but they did not foreclose such policies *and may indeed have invited them*.9/

We might, in this context of the E.R.A. and homosexual rights--specifically rights with respect to marriage--ask the questions that Bickel pointed towards. What policies are the Framers of the E.R.A. *not* foreclosing? What policies are the Framers *inviting*? The answers depend largely upon what policies with respect to marriage and rights have been evolving in the past decisions of the Supreme Court. A proposed constitituional guarantee as broadly worded as the E.R.A. is not a self-contained entity. It's going to take its place against a background of already evolved and still evolving understandings of social and constitutional concepts. And it's in this evolved and evolving constititutional and social background that we're most likely to find answers to the questions of what policies the Framers of the E.R.A. are inviting, and what policies they are not foreclosing.

First, what is the evolved and evolving constitutional background in the context of the institution of marriage. Traditional understandings of the definition of "marriage" as the legal union between one man and one woman were strongly upheld in the old Reynolds v. United States[10/] case in 1878, and most importantly in Reynolds the Supreme Court upheld the traditional statutorily mandated monogamous marriage in the face of a challenge based on a claimed constitutional right--the right to freely exercise one's religion when that religion demands polygamy. One would be tempted to regard the Reynolds case as at best shaky evidence of the constitutional background understanding of marriage. It's an old case--over a hundred years old. But that temptation has to take into account the more recent pronouncements of Justice Douglas, writing for the majority in the Griswold case, [11/] scarcely twenty years ago:

> We deal with a right of privacy older than the Bill of Rights--older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. The association promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[12/]

Reynolds and Griswold seem to uphold the argument that constitutional provisions impacting on the institution of marriage are understood as impacting on the traditionally defined concept of marriage.

But, just as our scientific understandings of the universe and the atom have evolved at a dizzying pace within the last twenty years, so too has a similar phenomenon occurred with respect to our social and constitutional understandings of institutions. The Griswold stress on the privacy rights of the married couple lasted but seven years. Justice Brennan, writing for the majority in the 1972 case of *Eisenstadt v. Baird*,[13] said of the *Griswold* stress on the traditional "couple" understanding of marriage and of the idea of how fundamental constitutional rights impact on the *Griswold* understanding of marriage:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[14]

In *form*, all *Eisenstandt* did was to extend the *Griswold* privacy right, which had been grounded in the marital relationship, to unmarried people; but in *emphasis* *Eisenstadt* signaled a new understanding of marriage in the background of constitutional rights. It's the individual who has the rights, not the couple, not the status entity. And it did more. Marriage had long been regarded as a constitutional right of fundamental importance. And it may not be incorrect to conclude that the "marriage" that was accorded fundamental constitutional stature in earlier Supreme Court decisions was the traditionally definied marriage. In the *Loving* case itself, drawing on the earlier *Skinner v. Oklahoma*[15] opinion, the Supreme Court said:

> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival.[16]

Eisenstadt signaled a change with its emphasis on individual rather than status. It's not suprising, then, that in the *Zablocki*[17] opinion we see, not marriage itself as the focal point of fundamental-rights analysis, but rather the *right to marry*.

The locus of the right is in the individual, and the right itself is a right to marry. The extent and strength of this individualistic understanding of the marital relationship is easily found and underscored in later cases, like *Planned Parenthood of Missouri v. Danforth*,[18] in which the Supreme Court further individuated the marriage relationship into rights possessed by individuals when it prohibited states from permitting husbands to have an equal say in the abortion decision.

My point in all this is to suggest that the Supreme Court's understanding of marriage has changed. It is no longer exclusively the old, traditional definition of a status, a covenant upon which the survival of the human race is grounded. It seems more like an important contract right possessed by individuals.

Another part of the background onto which the proposed E.R.A. will be superimposed is the Supreme Court's understanding of what it is that is at the heart of what's wrong about discrimination on account of sex. The Washington Court of Appeals in *Singer*[19] seemed to find the slogan "Equal pay for equal work" as exemplifying the primary purpose of Washington's E.R.A. I hope it doesn't take an extensive brief to justify the suggestion that what lies at the heart of the proposed federal E.R.A. is something far more complex and far deeper than the notion of bringing women's wages up to par. There is a great social movement going on, geographically more extensive, and demographically more pervasive, than even the fight for racial equality. It is a movement that is changing the roles of men and women. It is changing tradition. At its heart, and at the heart of so many contemporary Supreme Court decisions in the area of sex discrimination is the reaction to the ancient canard, the overbroad generalization, the byproducts of *traditional* ways of thinking about the sexes.[20]

I suggested earlier that the *proper* questions might be: What policies are the Framers of the E.R.A. *not* foreclosing? What policies are the Framers of the E.R.A. *inviting*? My own conclusion, against the background of *contemporary* social and constitutional understandings of marriage and sex discrimination is that the E.R.A. invites the new, less traditional *individuated* concept of *marriage*, marital rights, and the right *to* marry. Moreover the E.R.A. invites not simply a re-examination, but rather a rejection of ancient generalizations about sex, sex roles, and rights in general in the context of sex. If marriage, in its constitituional understanding, is becoming less "status" and more individual "contract," and is thus separated from the traditions that are the underpinning of the status concept of marriage--and if ancient canards about sex roles are at the heart of what the E.R.A. rejects--then it cannot by any fair account be asserted that the Framers of the E.R.A. are foreclosing a policy of mandated recognition of same-sex marriages.

FOOTNOTES

1. A. Bickel, THE LEAST DANGEROUS BRANCH (1962), p. 103.

2. J. Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980), p. 71.

3. Id.

4. 388 U.S. 1 (1967).

5. 82 Yale L.J. 573, 584, 585 (1973).

6. 11 Wash. App. 247, 522 P.2d 1187 (1974).

7. Id., p. 1192.

8. Quoted in Read, et al., MATERIALS ON LEGISLATION (4th ed. 1982), p. 750.

9. A. Bickel, THE LEAST DANGEROUS BRANCH (1962), p. 103 [Emphasis added].

10. 98 U.S. 145 (1978).

11. 381 U.S. 479 (1965).

12. Id.

13. 405 U.S. 438 (1972).

14. Id. [Emphasis added, except for the word "individual" which Justice Brennan himself chose to emphasize].

15. 316 U.S. 535, 541 (1942).

16. 388 U.S. 1, 12 (1967).

17. Zablocki v. Redhail, 434 U.S. 374 (1978).

18. 428 U.S. 52 (1976).

19. *Singer v. Hara*, 1[illegible] Wash. App. 247, 522 P.2d 1187 (1974).

20. See, e.g., *Orr v. Or*[illegible] 440 U.S. 268 (1979); *Califano v. Webster*, 430 U.S. 313 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); and *Califano v. Goldfarb*, 430 U.S. 199 (1977).

Senator Hatch. Thank you. That was a very thoughtful set of remarks.

I will have some questions for you in a few minutes but let us now turn to Professor Hickok, and we will take your testimony at this time, sir.

STATEMENT OF EUGENE W. HICKOK, JR.

Mr. Hickok. Thank you, Mr. Chairman.

Perhaps the most unique thing about this Nation's ongoing debate over the equal rights amendment, it seems to me, is that it is a debate concerning what the proposed amendment means.

Because of this, considerable disagreement about what exactly the ERA might accomplish remains. It is sobering to realize that for more than a decade a national dialog on the ERA has produced neither a consensus concerning its meaning nor the measure of support warranted to amend the Constitution.

My purpose today is not to take sides in this debate but to offer some reflections regarding what the effect of the equal rights amendment might have upon homosexual rights, should the amendment ever become a part of the Constitution. Both proponents and opponents of the ERA have expressed differing views on this issue.

It is my belief that the ERA may have a considerable impact in this area, at least calling into question, and probably overturning existing laws which place sanctions upon homosexual conduct and laws which limit certain actions by homosexuals, such as marriage.

At the outset it should be noted that it is my understanding that the ERA would set up a constitutional yardstick of absolute equality between men and women in all legal relationships.

I refer to the arguments of Prof. Thomas Emerson at the Yale University School of Law, when he argues that:

> ERA means that differentiation on account of sex is totally precluded regardless of whether a legislative or administrative agency may consider such a classification to be "reasonable", to be "beneficial" rather than "invidious", or to be justified by "compelling" reasons.

This is an absolutist interpretation of the ERA. I use it not only because I think the words have meaning, that words make a difference. But also because I think that is the interpretation endorsed by most of the proponents of the amendment itself.

However, this interpretation is at odds somewhat with the view held by some that the amendment does not establish strict standards and that a body of exceptions to the general rule of prohibiting sex classifications will be produced as courts apply a commonsense interpretation to the amendment.

There are severe problems, in my opinion, with this approach to the ERA, not the least of which is the fact that it means that those exceptions will be written by Federal judges rather than State and national elected officials. I am reminded of Chancellor Kent's comments that you will find judges roaming the trackless fields of their imaginations.

Nevertheless, I think the ERA will have the effect of calling into questions laws limiting any punishing homosexual conduct.

Under the ERA, a law which made illegal some relationship between two men or two women which would be permissible if entered into by a man and a woman would be brought into question. The issue of homosexual marriage provides an illustration of the possible impact of the ERA in this area.

At the present time, laws against homosexual marriage have been consistently upheld in the courts. According to Prof. Charles Rice:

"All the cases which have considered the question have held that there may be no valid marriage contract between persons of the same sex."

The courts have found that denial of a marriage license to homosexuals does not abridge existing equal protection laws.

Under existing law, the dispute over denying a marriage license to homosexuals revolves around three factors: Are homosexuals a suspect classification; is obtaining a marriage license considered important to homosexuals as a class; does the Government have a compelling interest in denying a license to same-sex couples?

It seems to me that by almost any measure, homosexuals merit serious consideration as a suspect class under the 14th amendment. As a group, homosexuals have experienced a history of discrimination, are held suspect due to a condition that is beyond their control, and have historically been the subject of derogatory myth.

The Supreme Court has never explicated its grounds for declaring certain classifications inherently suspect.

However, it seems to me that under the ERA homosexuals could be considered a suspect class. Should this be the case, I think it would be argued that the ERA would prohibit sex discrimination to the same degree that the 14th amendment currently prohibits race discrimination.

With regard to the importance of obtaining a marriage license to homosexuals as a class, while the "courts have never held that marriage, standing alone, is a sufficiently fundamental right to elicit use of any strict scrutiny standard," evidence suggests that we may see a revision of jurisprudence in this area.

If you look at "Black's Law Dictionary," marriage is defined as:

> The civil status, condition, or relation of one man and one woman united in law for life * * * and traditionally courts have defined marriage almost exclusively as a "union of man and woman, uniquely involving procreation and rearing of children within a family."

But more recently marriage has been viewed by the courts as a legal right, "one of the 'basic civil rights of man' fundamental to our very existence and survival."

In *Loving* v. *Virginia*, the Court recognized marriage to be: "* * * one of the vital personal rights essential to the orderly pursuit of happiness."

In *Griswold* v. *Connecticut*, the Court related marriage to the individual "right to association" protected through the 14th amendment.

As Perkins and Silverstein point out in the Yale Law Journal:

> It is unlikely, in light of these decisions and of the evolving attitudes toward marriage in our society, that constitutional protections surrounding the institution of marriage would be made dependent on the ability or willingness to bear children.

The argument can be made and has been accepted by the courts that marriage is an important legal right. The importance of marriage to homosexuals as a class has not been addressed by the Court. However, sanctioning of the marriage relationship carries various legal, social, and psychic benefits that would seem as important to homosexuals as to heterosexuals.

Moreover:

> Marriage ought reasonably be viewed as enhancing the stability, respectability, and emotional depth of any relationship between two individuals, regardless whether the relationship is homosexual or heterosexual.

Studies have demonstrated that "the belief that two persons having the same primary sexual characteristics cannot benefit from many of the emotional, social, and legal consequences of marriage" is untrue.

Traditionally the Government has supported its interest in uniformly denying marriage licenses to same-sex couples by arguing, among other things, that legalizing homosexual marriage would run counter to existing laws against homosexual acts. It would place the States therefore in a rather awkward position.

But I think it is fair to consider that some of these statutes may be unconstitutional anyway.

Since *Griswold* v. *Connecticut*, the courts have generally held that the constitutional right to privacy "prevents the application of sodomy statutes to the private, consensual acts of married couples."

Indeed, a Federal district court in Texas held in 1982, that: "Homosexual conduct in private between consenting adults is protected by a fundamental right to privacy."

Moreover, not only are such statutes at least questionable constitutionally, they are rarely enforced, bringing into question the seriousness with which the Government pursues its interests.

While the balancing of competing interests under the equal protection laws has so far upheld State laws limiting homosexual conduct such as marriage, the equal rights amendment would seem to present a different and stronger challenge.

> A statute of administrative policy would permit a man to marry a woman, subject to certain regulatory provisions, but categorically denies him the right to marry another man clearly entails a classification along sexual lines.

Under an absolutist interpretation of the ERA, such a statute I think would be unconstitutional. The applicable analogy is *Loving* v. *Virginia,* in which the Court ruled that Virginia's antimiscegnation statutes violated the 14th amendment. Here the Court stated that marriage is a legal right that cannot be denied to any individual on account of his race. According to the Court:

"Under our Constitution, the freedom to marry a person of another race resides with the individual and cannot be infringed by the State."

Under the equal rights amendment, one could substitute the words "same sex" for the words "another race" in the Court's opinions.

The legislative history of the ERA also supports the contention that differentiation on account of sex is totally precluded.

Indeed, an amendment to the ERA which would have excluded its applicability to "any law prohibiting sexual activity between persons of the same sex or the marriage of persons of the same sex" failed to gain support in the Senate.

Opponents of this interpretation might point to the case of *Singer v. Hara,* decided by the Court of Appeals of Washington in 1974. Here the court found that a law banning homosexual marriage did not conflict with the State's equal rights amendment, which is virtually identical to the proposed national ERA. In its opinion, the court ruled that:

> To accept * * * the contention that the ERA must be interpreted to prohibit statutes which refuse to permit same-sex marriages would be to subvert the purposes for which the ERA was enacted by expanding its scope beyond that which was undoubtedly intended by the majority of this State who voted for the amendment.

The court's decision in *Singer* is illustrative, in the words of the court, of a commonsense approach to the ERA.

The court goes on to point out that the State's refusal to grant a marriage license to same-sex couples:

> is not based upon the appellants 'status as males, but rather it is based on the State's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children.

I think there are several problems with the decision handed down in *Singer* v. *Hara,* not the least of which is the court's understanding of marriage. As stated earlier, society and the court have moved away dramatically from the concern with procreation cited in the *Singer* decision. Perhaps more importantly, the decision illustrates the major problem with a commonsense understanding of the ERA. How does the court know what was in the mind of the voters of Washington when they ratified the State's equal rights amendment?

Singer v. *Hara* is instructive in that it provides us with some indication of how the ERA might be interpreted according to a commonsense standard. Such a standard would provide judges with the discretion to assemble a package of exceptions to the amendment. The question then is this: Would a commonsense approach to the ERA have any impact upon homosexual rights?

Obviously it is difficult to predict what, if any effect the amendment might have in this area until the courts have had an opportunity to act. However, judicial decisionmaking since *Griswold* v. *Connecticut* demonstrates a discernible legal and social trend toward the practical recognition of the homosexual option as a legitimate, alternative way of life.

Homosexuality is no longer automatically a sufficient ground for dismissal as an employee, for example. And in child custody battles the trend is for the courts to hold that the homosexuality of one parent is not an automatic bar to that parent being awarded custody.

It is my opinion that the proposed 27th amendment to the Federal Constitution would have the effect of accelerating this trend in judicial decisionmaking as more and more interested citizens approach the courts seeking answers to the sorts of questions raised in this analysis and judges are forced to grapple with them.

While most of my comments have been directed at the issue of homosexual marriage, it is my understanding that ratification of the equal rights amendment would have the effect of calling into question all laws that constrain or punish homosexual conduct.

The issue of homosexual marriage is but one of many that needs to be considered. The extent to which Americans can expect to see major changes in homosexual rights occur can only be suggested, however, because of the curious nature of the ongoing debate.

My analysis has been premised on the belief that the amendment should be interpreted as it is written and the belief that a less-than-literal approach to the amendment not only calls into question the necessity of the ERA but also raises the possibility that judges will become even more active as propagators of public policy. To the extent that this will alter the balance of constitutional powers, I find little solace in Alexander Hamilton's assertion that the judiciary will always be the least dangerous to the political rights of the Constitution.

[The following was received for the record:]

PREPARED STATEMENT OF EUGENE W. HICKOK, JR.

Perhaps the most unique thing about this nation's ongoing debate over the Equal Rights Amendment is that it is a debate concerning what the proposed Amendment means. Because of this, considerable disagreement about what exactly the ERA might accomplish remains. It is sobering to realize that for more than a decade a national dialogue on the ERA has produced neither a consensus concerning its meaning nor the measure of support warranted to amend the Constitution.

My purpose today is not to take sides in this debate but to offer some reflections regarding what effect the Equal Rights Amendment might have upon homosexual rights, should the Amendment ever become a part of the Constitution. Both proponents and opponents of the ERA have expressed differing views on this issue. It is my belief that the ERA may have a considerable impact in this area, at least calling into question, and probably overturning existing laws which place sanctions upon homosexual conduct and laws which limit certain actions by homosexuals, such as marriage.

At the outset it should be noted that it is my understanding that the ERA "would set up a constitutional yardstick of absolute equality between men and women in all legal relationships."[1] It would require that sex-based laws be judged with the same rigor in courts as race-based laws currently are judged. According to Professor Thomas Emerson of the Yale University School of Law, "ERA means that differentiation on account of sex is totally precluded regardless of whether a legislative or administrative agency may consider such a classification to be 'reasonable', to be 'beneficial' rather than 'invidious', or to be justified by 'compelling' reasons."[2] According to Professor Emerson

> The basic principle of the Equal Rights Amendment is that sex is not a permissible factor in determining the legal rights of women, or of men. This means that the treatment of any person by the law may not be based upon the circumstances that such person is of one sex or another . . . only an unequivocable ban against taking sex into account supplies a rule adequate to achieve the objectives of the Amendment.[3]

This "absolutist" interpretation of the ERA is at odds somewhat with the views held by some that the Amendment does not establish strict standards and that a body of of exceptions to the general rule of prohibiting sex classifications will be produced as courts apply a "commonsense" interpretation to the Amendment. There are severe problems, in my opinion, with this approach to the ERA, not the least of which is the fact that it means that those exceptions will be written by federal judges rather than state and national elected officials. Nevertheless, even under a "commonsense" interpretation of the Amendment, I believe the ERA will have the effect of calling into question laws limiting and punishing homosexual conduct.

Under the ERA, a law which made illegal some relationship between two men or two women which would be permissible if entered into by a man and a woman would be brought into question. The issue of homosexual marriage provides an illustration of the possible impact of the ERA in this area.

At the present time, laws against homosexual marriage have been consistently upheld in the courts. According to Professor Charles Rice of the Law School at Notre Dame

University, "all the cases which have considered the question have held that there may be no valid marriage contract between persons of the same sex."[4] The courts have found that denial of a marriage license to homosexuals does not abridge existing equal protection law. However, the ERA, if ratified, would almost certainly change things.

Under existing law, the dispute over denying a marriage license to homosexuals revolves around three factors: are homosexuals a "suspect" classification and therefore subject to the sorts of protections afforded minorities under the equal protection clause of the Fourteenth Amendment; is obtaining a marriage license considered important to homosexuals as a class; does the government have a compelling interest in denying a license to same-sex couples?[5]

It would seem that by almost any measure, homosexuals merit serious consideration as a "suspect" class under the Fourteenth Amendment. As a group, homosexuals have experienced a history of discrimination, are held suspect due to a condition that is beyond their control, and have historically been the subject of derogatory myth. If it is true that since the Supreme Court has never explicated its grounds for declaring certain classifications inherently "suspect", it may well be the case that the Court might reasonably find that discrimination against homosexuals is not as burdensome as that affecting other groups. However, under the ERA homosexuals would automatically be considered a "suspect" class. The ERA would prohibit sex discrimination to the same degree that the Fourteenth Amendment presently prohibits race discrimination.

With regard to the importance of obtaining a marriage license to homosexuals as a class, the "courts have never held that marriage, standing alone, is a sufficiently fundamental right to elicit use of any strict scrutiny standard."[6] However, evidence suggests that the courts may be in the process of revising traditional jurisprudence in this area.

Black's Law Dictionary defines marriage as "the civil status, condition, or relation of one man and one woman united in law for life . . ."[7] and traditionally courts have defined marriage almost exclusively as "a union of man and woman, uniquely involving procreation and rearing of children within a family."[8] But more recently marriage has been viewed by the courts as a legal right, "one of the 'basic civil rights of man' fundamental to our very existence and survival."[9] In Loving v. Virginia, the Court recognized marriage to be "one of the vital personal rights essential to the orderly pursuit of happiness."[10] In Griswold v. Connecticut, the Court relates marriage to an individual "right to association" protected through the Fourteenth Amendment. As Perkins and Silverstein point out in The Yale Law Journal

> It is unlikely, in light of Court dicta and of the evolving attitudes toward marriage in our society, that Constitutional protections surrounding the institution of marriage would be made dependent on the ability or willingness to bear children.[11]

Perhaps the most pressing argument against the recognition of homosexual marriage is the theoretical argument that marriage, by definition, means the union of a man and a woman. But an analogous situation confronted the framers of the Fourteenth Amendment. Certainly prior to that Amendment, voters were "by definition" white male property-owners. Indeed, the Fourteenth Amendment was passed "for the express purpose of preventing the enforcement of exclusionary classifications based upon deeply felt beliefs which are not grounded on objective, rational distinctions."[12]

The argument can be made and has been accepted by the courts that marriage is an important legal right. The importance of marriage to homosexuals as a class has not been addressed by the Court. However, sanctioning of the marriage relationship carries various legal, social and psychic benefits that would seem as important to homosexuals as to heterosexuals. Moreover, "marriage ought reasonably be viewed as enhancing the stability, respectability, and emotional depth of any relationship between two individuals, regardless whether the relationship is homosexual or heterosexual."[13] And studies have demonstrated that "the belief that two persons having the same primary sexual characteristics cannot benefit from many of the emotional, social, and legal consequences of marriage is untrue."[14]

Traditionally the government has supported its interest in uniformly denying marriage licenses to same-sex couples by arguing, among other things, that legalizing homosexual marriage would run counter to existing laws against homosexual acts. However, such statutes may very well be unconstitutional anyway. Since Griswold v. Connecticut, the courts have generally held that the constitutional right of privacy "prevents the application of sodomy statutes to the private, consensual acts of married couples."[15] Indeed, a federal district court in Texas held in 1982, that "homosexual conduct in private between consenting adults is protected by a fundamental right to privacy."[16] Moreover, not only are such statutes questionable constitutionally, they are rarely enforced, bringing into question the seriousness with which the government pursues its interests.

While the balancing of competing interests under the equal protection laws has so far upheld state laws limiting homosexual conduct such as marriage, the Equal Rights Amendment would seem to present a different and stronger challenge to existing laws. "A statute or administrative policy which would permit a man to marry a woman, subject to certain regulatory provisions, but categorically denies him the right to marry another man clearly entails a classification along sexual lines."[17] Under an "absolutist" interpretation of the ERA, such a statute would be unconstitutional. The applicable analogy is Loving v. Virginia, in which the Court ruled that Virginia's anti-miscegenation statutes violated the Fourteenth Amendment. Here the Court stated that marriage is a legal right that cannot be denied to any individual on account of his race. According to the Court, "Under our Constitution, the freedom to marry, a person of another race resides with the individual and cannot be infringed by the state."[18] Under the Equal Rights Amendment, one could substitute the words "same sex" for the words "another race" in the Court's opinion; for just as the Fourteenth Amendment makes race a suspect classification, the proposed Twenty-Seventh Amendment makes sex a suspect classification.

> In light of the frequently asserted claim that the Equal Rights Amendment was designed to prohibit sex discrimination to at least the degree that the Fourteenth Amendment presently prohibits racial discrimination, Loving would appear to raise a strong presumption that homosexual couples could not be uniformly denied marriage licenses after ratification of the Twenty-Seventh Amendment.[19]

The legislative history of the ERA supports the contention that 'differentiation on account of sex is totally precluded."[20] Indeed, an amendment to the ERA which would have excluded its applicability to "any law prohibiting sexual activity between persons of the same sex or the marriage of persons of the same sex" failed to gain support in the Senate.[21]

Opponents of this interpretation might point to the case of Singer v. Hara, decided by the Court of Appeals of Washington in 1974. Here the court found that a law banning homosexual marriage did not conflict with the state's Equal Rights Amendment, which is virtually identical to the proposed national ERA. In its opinion the court ruled that "to accept . . . the contention that the ERA must be interpreted to prohibit statutes which refuse to permit same-sex marriages would be to subvert the purposes for which the ERA was enacted by expanding its scope beyond that which was undoubtedly intended by the majority of this state who voted for the amendment."[22] The court's decision in Singer is illustrative, in the words of the court, of a "commonsense" approach to the ERA. The court goes on to point out that the state's refusal to grant a marriage license to same-sex couples "is not based upon the appellants' status as males, but rather it is based on the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children."[23]

There are several problems with the decision handed down in Singer v. Hara, not the least of which is the court's understanding of marriage. As stated earlier, society and the Court have moved away dramatically from the concern with procreation cited in the Singer decision. Perhaps more importantly, the decision illustrates the major problem with a "commonsense" understanding of the ERA. How does the court know what was in the mind of the voters of Washington when they ratified the state's Equal Rights Amendment?

Singer v. Hara is instructive in that it provides us with some indication of how the ERA might be interpreted according to a "commonsense" standard. Such a standard would provide judges with the discretion to assemble a package of exceptions to the Amendment. The question then is this: Would a "commonsense" approach to the ERA have any impact upon homosexual rights?

Obviously it is difficult to predict what, if any effect the Amendment might have in this area until the courts have had an opportunity to act. However, judicial decision making since Griswold v. Connecticut demonstrates a "discernible legal and social trend toward the practical recognition of the homosexual option as a legitimate, alternative way of life."[24] Homosexuality is no longer automatically a sufficient ground for dismissal as an employee, for example. And in child custody battles "the trend is for the courts to hold that the homosexuality of one parent is not an automatic bar to that parent being awarded custody."[25] It is my opinion that the proposed Twenty-Seventh Amendment to the Federal Constitution would have the effect of accelerating this trend in judicial decision making as more and more interested citizens approach the courts seeking answers to the sorts of questions raised in this analysis and judges are forced to grapple with them.

While most of my comments have been directed at the issue of homosexual marriage, it is my understanding that ratification of the Equal Rights Amendment would have the effect of calling into question all laws that constrain or punish homosexual conduct. The issue of homosexual marriage is but one of many that needs to be considered. The extent to which Americans can expect to see major changes in homosexual rights occur can only be suggested, however, because of the curious nature of the ongoing debate over the ERA. My analysis has been premised on the belief that the Amendment should be interpreted as it is written and the belief that a less-than-literal approach to the Amendment not only calls into question the necessity of the ERA but also raises the possibility that judges will become even more active as propagators of public policy. To the extent that this will alter the balance of constitutional powers, I find little solace in Alexander Hamilton's assertion that the judiciary will always be "the least dangerous to the political rights of the Constitution."[26]

Notes

1. From a statement of opposition to the Equal Rights Amendment by Roscoe Pound and Paul Freund, Harvard Law School, quoted in Minority Views of Senator Sam Ervin, Senate Report.

2. Thomas Emerson in "In Support of the Equal Rights Amendment", *Harvard Civil Rights Civil Liberties Law Review*, 225,231 (1971).

3. Brown, Emerson, Falk, and Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women", 80 *Yale Law Journal* 871 (1971).

4. From "legalizing Homosexual Conduct" to be published by *The Center for Judicial Studies*, Washington, D.C.

5. Much of the material regarding the current status of homosexual marriage in the courts is based upon arguments presented by Perkins and Silverstein in "The Legality of Homosexual Marriage", 82 *Yale Law Journal* (1973).

6. *Ibid*., page 578.

7. Black, *Law Dictionary*, (4 ed.), page 1123.

8. See *Baker* v *Nelson*, 191 N.W. (2d) 185.

9. See *Loving* v *Virginia* 388 U.S. 1, 12 (1967). See also *Skinner* v *Oklahoma* 316 U.S. 535, 541 (1942) and *Maynard* v *Hill*, 125 U.S. 190 (1888).

10. *Loving* v *Virginia* 388 U.S. 1, 12 (1967).

11. Perkins and Silverstein, op...cit., page 579.

12. *Ibid*., page 582.

13. See E. Griffith, *Marriage and the Unconscious* (1957), page 12, cited in Perkins and Silverstein, op...cit., page 580.

14. Ibid., page 588.

15. From Rice, op...cit.

16. Ibid.

17. Perkins and Silverstein, op...cit., page 583.

18. See Loving v Virginia 388 U.S. 1, 12 (1967).

19. Perkins and Silverstein, op...cit, page 584.

20. See Emerson, "In Support of the Equal Rights Amendment" 6 Harvard Civil Rights-Civil Liberties Law Review 225,231 (1971).

21. See Congressional Record, Senate March 21, 1972, page 9315.

22. See Singer v Hara 11 W.N. App.247,522 P 2d. 1187 (1974).

23. Ibid.

24. See Rice, op...cit.

25. Ibid.

26. Alexander Hamilton, Federalist No. 78.

Senator HATCH. Thank you so much. I think both of your statements have been very, very good.

I do have some questions that I would like to ask you.

Could each of you share with me your perspectives not on the logical understanding of the text of the ERA, but on what you believe to be the intent of the framers of the amendment?

Do either of you believe that significant consideration has ever been given by such individuals to the issue of homosexual rights?

In other words, has this issue been raised inadvertently by the words of the ERA or has it been a conscious part of the intent of the framers of the equal rights amendment?

Let us start with you, Dr. Marcin.

Mr. MARCIN. What I've suggested in my remarks is that neither a literal nor an intent interpretation is going to be productive, but if one were to use either of those methods, one would not be amiss in concluding that the ERA raises a problem in that area and therefore it is incumbent upon the framers of the ERA to resolve that question. I do not think they have resolved it.

Senator HATCH. Professor Hickok?

Mr. HICKOK. My impression, and I am afraid it is merely an impression, is that the framers and the supporters of it initially probably did not consider this issue. And I think the best argument we have to support that impression is the fact that the wording of the amendment opens up all kinds of questions such as homosexual rights.

Senator HATCH. They did not anticipate many of the issues which could arise from the equal rights amendment?

Mr. HICKOK. Exactly. I think if they had thought of these issues coming up, perhaps the wording would be different.

Senator HATCH. I see.

The Yale Law Journal article on ERA and homosexual rights seems to adopt the fairly straightforward syllogism as follows:

First, individual A, a male, can legally marry individual B, a female.

Second, individual A, a male, cannot legally marry individual C, also a male.

Third, hence, individual C, a male, is being discriminated against solely on the basis of his sex in violation of the clear language of the equal rights amendment.

Do you believe that is a fair statement of their proposition; and how would you respond to this on legal grounds?

Let us start again with you, Professor.

Mr. MARCIN. I think it is a fair statement.

Senator HATCH. Is it a fair statement of what they meant in their article?

Mr. MARCIN. I believe it is a fair statement of what they meant in their article, but it is not the only possible viewpoint. Senator Bayh once indicated that since a statute prohibiting same-sex marriages would apply equally to both sexes, there cannot be any discrimination. The tenor of my remarks, however, has been that the focus of the Supreme Court is now on the individual not on the group. It is only individuals who have rights. And so I think that the statement made by the authors of the Yale Law Journal article is accurate in that it places the locus of the rights in the individual.

Senator HATCH. Professor Hickok.

Mr. HICKOK. I remember the Emerson article and I would agree, I think it is a fair statement of the argument.

About Senator Bayh's comments, he was relating *Loving* v. *Virginia* into the issue brought up in this case, homosexual rights, and argued that the difference is, as Professor Marcin has pointed out, that in this case we are denying to every man and every woman.

But I think we are talking about individual rights a[illegible] that the ERA makes the difference in this case. Understanding the amendment in this way, it makes sense. And, therefore, I think Senator Bayh's argument is at least brought into question.

Senator HATCH. Some leading theoreticians of the ERA movement, often suggest a number of exceptions to what they describe as the absolute principle of the equality contained in the equal rights amendment. I would like to raise these with you briefly in order to determine whether the issue of homosexual marriage might fall within any of these particular exemptions.

The first major exemption relates to what they describe as the right to privacy.

Now, do either of you see the right to privacy as posing any significant barrier to a constitutional requirement of homosexual marriages in the ERA?

Mr. MARCIN. Do rights to privacy pose a barrier to homosexual marriages?

Senator HATCH. As a principle.

Mr. MARCIN. I think the right to privacy would likely stand behind the proposition that homosexual marriages should be recognized.

Senator HATCH. So you are saying that the right to privacy arguments that have been put forward in some of the cases that have been cited, would tend to support, if the ERA is ratified, a right to homosexual marriages?

Mr. MARCIN. Yes, one hears the right to privacy argument made in connection with the so-called bathroom issue. The argument is that the ERA does not require unisex public restrooms because that would be intruding on people's privacy.

But in homosexual marriages, where is the locus of the right? It is in the two individuals who are seeking to marry. They are not intruding into the space or into the marital relationship of anyone else. And, therefore, I see the right of privacy cutting in favor of the recognition of their rights.

Senator HATCH. That is interesting because the right to privacy according to the understanding of those such as Professor Emerson involves such issues as unisex restrooms and unisex dormitories. It would not concern marital rights between consenting individuals, if I understand him correctly.

What is your feeling?

Mr. HICKOK. I would tend to agree with Professor Marcin that the right to privacy, especially if you look at the decisions since *Griswold* v. *Connecticut* on the issue of consenting adults, for example, would stand behind and support the general movement toward same-sex marriages.

Senator HATCH. I see.

The next major exception relates to what some ERA proponents call the "unique physical characteristics exception." Do either of you see the unique physical characteristics exception as posing any barriers to homosexual marriage?

Go ahead, Professor, I will start with you this time.

Mr. HICKOK. I guess the argument would be that if marriage by definition is supposed to pertain to procreation and the rearing of children, then obviously the unique characteristic would matter quite a bit. But I do not think if you look at the way the Court is moving and society is moving toward the notion of marriage, redefining our understanding of marriage, that concern is still central. Therefore I do not know that the characteristic issue would pose a problem here.

Senator HATCH. Go ahead, Professor Marcin.

Mr. MARCIN. I think we could add a little further. Even if the traditional definition of marriage still influenced or informed the meaning of the proposed constitutional provision, the unique-physicial-characteristics exception would still be of questionable relevance. It is almost an absurdity to suggest that the State would have the power to prohibit sterile people from marrying. The State recognizes that individuals have a right to marry independent of their ability to procreate. The State has never recognized ability to procreate as a prerequisite of the right to marry.

Senator HATCH. Both of you have made interesting points in this area. If it is so that the unique physical characteristics exception poses a significant barrier to homosexual marriage, it would have to be on the premise that the sole purpose of the marriage is to procreate. If that is the case, we might as well outlaw marriages between individuals beyond child-bearing age or those otherwise unable or unequipped to have children.

Assume that the ERA has been ratified. Instead of the immediate culture shock of legalized marriage of homosexuals, do you see the possibility instead that the judiciary will increasingly afford equal rights to homosexual partners such as survivor benefits, insurance benefits, property benefits, and so forth?

In other words, as a kind of transition program, do you anticipate a gradual extension to homosexual partners of the array of legal benefits to which only married individuals are currently entitled? Along these lines, for example, I note the recent ordinance by the city council in San Francisco whereby homosexual couples were legally entitled to public employee insurance benefits upon the payment of a fee legally establishing a quasi-marital relationship.

Let us start with you, professor.

Mr. MARCIN. It seems to be a trend in other contexts to recognize rights that attend or surround the marital relationship, without recognizing the marital relationship itself. Nonmarital cohabitation contracts, express or implied, have been gaining in recognition among the State courts. Some of the courts recognize rights that would otherwise adhere in married individuals.

In the case of homosexual individuals who are living under a cohabitation agreement, courts could, influenced by the ERA, fall into that pattern of recognizing rights that attend marriage, that is, inheritance rights or rights to some sort of spousal support in the event of separation, even though they might not recognize the marriage itself as a full legal marriage.

Senator HATCH. Do you agree?

Mr. HICKOK. I do, not only because of action such as in San Francisco but if you look at the decisions by the courts since *Griswold* on the whole idea of homosexual activity and conduct and limitations and constraints, you see a general liberalization in this area.

So I would anticipate that along the same lines you will see more of this activity, certainly under the 27th amendment.

Senator HATCH. Given the virtually unanimous opinion of ERA advocates that ERA would equate the judicial treatment of race and sex classifications, would it be wrong to assume that the Supreme Court's decision in *Loving* v. *Virginia* declaring laws as you stated against interracial marriage to be unconstitutional, would be controlling in understanding the meaning of the equal rights amendment?

Mr. HICKOK. I think the argument that they bring in opposition to the argument that I made in *Loving* v. *Virginia* is that you are talking about an individual who is a member of a group being treated differently than other individuals and that is why *Loving* v. *Virginia* is different from say an ERA case of a similar type—a homosexual case of a similar type is that all men are denied the right and all women are denied the right to marry someone of the same sex, so they are not being singled out.

But the argument I think fails in that the Constitution does not grant group rights. I think it is one of the common problems that we have had with this whole area of jurisprudence in recent years, the notion of group rights as opposed to individual rights.

For that reason, I think *Loving* v. *Virginia* does hold a lot of weight.

Senator HATCH. But for the fact that the individual is a man or a woman, they would be entitled to be married. That tends to back up what both of you are saying.

Professor, if you have any comment on that?

Mr. MARCIN. In the *Loving* precedent it is not all that easy to change the names and change the category and come up with the automatic precedent. The law involved in *Loving* v. *Virginia* merely prohibited interracial marriages in which a white person was one of the parties. So there was a definite stigma attached to the mixing of white blood, that is a definite disparagement of the other races.

Professor Hickok has mentioned the issue of group constitutional rights. It is true, constitutional rights inure only in the individual. But someone who would argue that *Loving* is inopposite would take the position that in a sense there are group constitutional rights and group constitutional restrictions. In some context, one must admit, there seem to be. We tolerate benign racial preference schemes when they are seen as necessary to remedy past discrimination. In a sense that is a recognition of a group, of races' rights under the Constitution.

Senator HATCH. Let us assume that a majority of the Members of Congress do not want to allow legal sanction of homosexual marriages.

What would you suggest should be the change of language in the equal rights amendment to accomplish that? Have you given much thought to that?

Mr. Hickok. I believe it was Senator Ervin who introduced an amendment in the Senate that would have—I quote it in my presentation—said something to the effect that this does not apply to same-sex marriage, etc. And I think it would have to be pretty——

Senator Hatch. Are you saying it would have to be explicit?

Mr. Hickok. I would think so.

Senator Hatch. Do you agree with that?

Mr. Marcin. Yes.

Senator Hatch. Both of you agree that language added to the ERA would have to very explicitly outlaw homosexual marriages, assuming that a majority of the Members of Congress would want to do so in order to avoid mandating the legalization of homosexual marriages across the country?

Mr. Hickok. Well, at least it helps to close the door on the issue. I am not saying that the ERA the way it presently stands in the eyes of Members of Congress would automatically make homosexual marriages constitutional, although I think it would. I do not think everyone in Congress would necessarily agree with it. But the only way to make sure it does not is to amend the ERA along the line suggested in the Senate.

Senator Hatch. Professor Marcin.

Mr. Marcin. There is an argument against putting explicit, very specific provisions into the Constitution, that constitutional provisions should be broadly worded, they should speak for the future.

Senator Hatch. Not if you want to outlaw these things.

Mr. Marcin. But if one has a good enough reason for putting specifics into the wording of a constitutional provision, then there should not be any barrier.

Senator Hatch. If homosexuals are to have the same right to marry persons of the same sex, then that ought to be made clear. We ought to face the issue and do whatever is desired by the Congress on this issue. It either ought to be made clear that Congress did not want to give legal sanction or that it did want to give legal sanction. That is how the Congress ought to deal with these anticipated controversies.

A recent analysis of the ERA homosexual issue prepared by the Library of Congress has concluded that the resolution of this issue is not a simple one and will require clear legislative history. And that is what we are attempting to do here today.

The Library of Congress study also concludes that there may be guidance contained in title VII.

I would like to know your response to this conclusion. For instance, would you share with me your perspective on the significance, if any, of the recent Federal court decision in *Ulane* v. *Eastern Airlines* in which the ban on sex discrimination in title VII was construed to prohibit discrimination on the basis of having had a sex change operation.

Is that a relevant decision at all? The court in that case seemed to suggest a certain interpretation of title VII that would cover that kind of controversy.

I would like to hear your comments. Let us start with you, Professor Marcin.

Mr. MARCIN. It might be relevant but its relevance might be limited by the fact that EEOC determinations are entitled to great weight before the Supreme Court because EEOC is the Government agency charged with the implementation of certain portions of the 14th amendment. EEOC is not yet charged with the implementation of the ERA, of course, and its positions might be considered speculative. But to the extent that they might be relevant, I think the case that you mentioned goes to the issue of discrimination on account of sexual preference. One has preferred a different sexual identity and then has taken steps to achieve that sexual identity and one cannot be discriminated against on account of it.

If EEOC and the U.S. district courts are coming down against that form of sexual-preference discrimination on the basis of the protection given sex under the 14th amendment, which is not as great as the protection given sex classifications under the ERA, then I think it is an a fortiori argument that the courts are going to be extending the ERA to the coverage of sexual preference.

Senator HATCH. Professor.

Mr. HICKOK. I would tend to agree. I think the most interesting thing about that issue is the reliance upon a strict interpretation. And I think that at least gives me the impression that we can expect to see the ERA as far as implementation and administrative decisions along the same lines, which points out that although some might argue that you want to have relatively brief and open-ended kinds of amendments, you also want to have amendments that are pretty carefully crafted. And I think that is one of the problems with this one.

Senator HATCH. Thank you.

In the 1980 New York case, *People* v. *Onofre*, the high court in that case in the State of New York ruled that consensual sodomy may not be deemed criminal.

Would either of you believe that a similar decision might be mandated by either Federal or State courts under the equal rights amendment?

Let us start with you, Professor.

Mr. HICKOK. Yes, I do. I think so.

Senator HATCH. Professor Marcin.

Mr. MARCIN. Of course the Supreme Court has avoided that question——

Senator HATCH. But they would not be able to avoid it under ERA, would they?

Mr. MARCIN. They could not avoid it under ERA.

Senator HATCH. They could not avoid it under ERA?

Mr. MARCIN. The question would become, can the State prohibit sexual relations between unmarried homosexuals to the same extent that it can prohibit sexual relations between unmarried heterosexuals? Laws prohibiting fornication have not yet been authoritatively stricken as unconstitutional.

Senator HATCH. So this might have a tendency to outlaw sodomy and fornication laws generally?

Mr. MARCIN. Sodomy laws, insofar as they apply to homosexual activity, would have to be treated the same way as fornication laws would have to be treated. And fornication laws are still constitutionally valid for the most part.

Senator HATCH. Professor Marcin, given the statements of such leading ERA experts such as Professor Emerson and Professor Freedman of the Yale and Rutgers law schools respectively, are you entirely comfortable with the notion that a literalist interpretation of the ERA is not entirely appropriate? Indeed, this has been a fairly consistent theme throughout these hearings by ERA proponents themselves, that the ERA ought to be understood literally. Why should not we take them at their word?

Mr. MARCIN. I suppose we should take them at their word, it certainly is their belief. I do not think there has been a history of interpreting literally any constitutional provision except perhaps ones like that which requires the President to be at least 35 years of age. Constitutional provisions of an individual-rights nature are not interpreted literally. The constitutional meaning evolves with the generations. If the equal protection clause were interpreted literally, we would have to rule affirmative action or benign remedial racial preference schemes to be contrary to the equal protection clause.

Senator HATCH. Do I understand you to be saying that our legal system has increasingly viewed the marital relationship as a kind of legal contract akin to any other kind of economic contract and that to this extent the courts are increasingly likely to be receptive to the simple syllogism of the Yale Law Journal article on how laws against homosexual marriage constitute sexual discrimination.

Would that be a fair capsulization of your opinion?

Mr. MARCIN. Yes, it would.

Senator HATCH. Anita Miller, who is the former chairman of the California commission on the status of women, has argued that the ERA is "the singlemost significant event of this century and will bring about a dimension of change greater than ever before."

Professor Marcin, would you agree with me that she is viewing the ERA as something far greater than simply a vehicle for achieving equal pay for equal work?

Mr. MARCIN. Yes; that is the point I tried to make. I do not think it could be seriously argued that that is all that the ERA is about. The ERA is part of a genuine social resolution. Proponents of ERA certainly view the social revolution that is going on as being a good and advantageous thing. And it certainly goes beyond the equal pay issue and into many, many other issues.

Senator HATCH. Let me just go into that a little bit more.

Another important analysis on ERA, Impact, ERA, published by a number of female legal scholars concluded that the purpose of the ERA was to transform the social order and to establish a new and radically different period of human relations.

Now, professor, is this what you have in mind when you refer to the ERA as challenging traditional ways of thinking about the sexes?

Mr. MARCIN. Yes. Not only the ERA but the constitutional background onto which it is to be superimposed makes that very same point. The focus in today's U.S. Supreme Court sex discrimination cases is on the avoidance of the ancient canard, the traditional ways of thinking about women and about the roles of women in society. A State can no longer take the Victorian viewpoint as to the roles of husband and wife. A State is now, under Supreme Court interpretation of the equal protection clause, prohibited from adopting that viewpoint of a marriage relationship and certainly, with the ERA, it will move forward from there. There may not be much of a radical change in society, but only because the Court has gone quite a bit in that direction already under the equal protection clause.

Senator HATCH. Professor Hickok, what is the law today and what has traditionally been the state of the law in this country with respect to the recognition of homosexual marriages?

Mr. HICKOK. As far as I know, consistently the courts have not recognized it.

Senator HATCH. Consistently the courts have not recognized homosexual marriages?

Mr. HICKOK. Have not recognized homosexual marriage and have relied primarily upon the notion that marriage is by definition a relationship between a man and a woman. However, it seems to me that the whole point of the ERA—not the whole point—the effect of the ERA is to have us rethink those kinds of definitions to the same extent that the effect of the 14th amendment on race forced people to rethink the definition of things such as the right to vote, what a voter is.

Senator HATCH. Could you please elaborate for the committee on your suggestion that homosexuals, per se, might represent a protected group or suspect class under the ERA?

Mr. HICKOK. Well, I think I was trying to draw the argument out that under the 14th amendment equal protection laws, for example, the reasoning behind the courts not granting homosexuals or same-sex couples the right to marry has been based upon this balancing of competing interests and that they have not recognized so far homosexuals to be a suspect class the same way that they have recognized other minorities

I think the ERA at least brings into question whether they would not be a suspect class to the extent that it makes sex a suspect classification.

So I do not think it is necessary to argue that they would automatically be a suspect class but I think it opens up that consideration.

Senator HATCH. Would you say that the greater concern with the equal rights amendment is that the enhancement of homosexual rights logically and naturally flows from its text or rather that it is sufficiently unclear and unfocused so that Federal judges are likely to read into its terms anything that they care to? What precisely would be your own perspective?

Mr. HICKOK. Well, my perspective is that the ERA, the text of the ERA itself I think leads logically to the conclusions that I have reached. But I also think that those that argue it does not because of a commonsense approach to it sort of have to face the fact that the way the courts are acting at this time, and the ability of a judge to exercise his discretion in putting together these exceptions, it seems to me that you still end up with the same kind of conclusions.

Mr. **Marcin**. You asked whether the lower Federal judges might read anything that they want to into the general wording of the ERA. To some extent that is certainly true and it becomes then the responsibility of the U.S. Supreme Court to define the meaning of the ERA. But that just focuses on an issue that we should be focusing on here today. In the first instance it should be Congress and the framers of the ERA that clarify its meaning.

Senator **Hatch**. Are you saying that this really ought to be a legislative function?

Mr. **Marcin**. In the first instance, yes.

Senator **Hatch**. It is one of the contentions that if we ratify the ERA that Congress would be abdicating a tremendous amount of constitutional responsibility to unelected judges.

I do not believe that it is in the best interests of this Nation to take all of this decisionmaking authority from officials who are accountable and responsive and turn over that power to unelected judges who are not, and ought not be, responsive and accountable.

Mr. **Hickok**. I would only add that I think one of the great problems with this whole issue is that too many people believe that it is up to the courts to make these kinds of definitions. I think Congress has a real constitutional responsibility, that the Supreme Court is not the sole arbiter of what the Constitution says, that the Congress, the President have an opportunity and an obligation to have some understanding of what the Constitution mandates or what an amemdment means, and so forth. That is the purpose for hearings like this, I would think.

Senator **Hatch**. Congress has an increasingly great tendency to abdicate its responsibilities in some areas. For example, in the area of economics we can say it has to be the Federal Reserve Board's fault that we have such high interest rates. And in so much of the legislation that we write we abdicate the responsibility to the bureaucracy and allow them to make all the important determinations.

One point that Professor Emerson has made is that the issue under the ERA cannot be reasonable or unreasonable classification. The constitutional mandate must be absolute—equality of rights means that sex is not a factor at all. Do we take proponents at their word or don't we?

Do you believe that the ERA opens up the issue of homosexual rights in a variety of other contexts? If so, what might some of these be?

Mr. **Marcin**. Well, certainly, were I a lawyer for someone concerned with homosexual rights, I would rejoice at the approval of the ERA and would look to it as a provision that guarantees——

Senator **Hatch**. If you were an advocate for homosexual rights?

Mr. **Marcin**. Yes. In the context of other rights of homosexual citizens, the enactment of the ERA would have direct meaning in what everybody admits is involved in the ERA, the equal pay for equal work idea, and the employment discrimination area in general.

Beyond that, one must look I think to those categories——

Senator **Hatch**. Excuse me. Could you hold for just a second? [Pause.]

Senator Hatch. Go ahead, Professor. I am sorry to interrupt you like that.

Mr. Marcin. Beyond the employment context, which is certainly involved, I think one has to look at those categories to which the equal protection clause has been applied. One looks to State colleges and universities and the rights of the individuals in those institutions, one looks at public schools and the rights of individuals in those schools.

Senator Hatch. You mean to teach?

Mr. Marcin. To teach, to not be discriminated against as a student in any way.

Senator Hatch. To counsel students?

Mr. Marcin. To counsel students.

Senator Hatch. To render medical care and treatment to students?

Mr. Marcin. I would certainly feel comfortable as an advocate arguing that the ERA guarantees the right of homosexual individuals to equal consideration for a job as a counselor in a public high school or a college.

Senator Hatch. So what you seem to be saying is that should the equal rights amendment pass, homosexual would be invested with new constitutional rights *qua* homosexuals?

Mr. Marcin. Yes.

Senator Hatch. As a class, they should be strong supporters of the equal rights amendment?

Mr. Marcin. I would say so.

Senator Hatch. Because it will accord them rights that presently are nonexistent? Is that correct?

Mr. Marcin. Yes.

Senator Hatch. Do you agree with that, Professor Hickok?

Mr. Hickok. Yes, I do.

There is a legal trend in this area to at least overturn or bring into question a lot of these statutes or constraints on homosexual behavior already, so the ERA should it become a part of the Constitution, at least I think will accelerate that trend as more and more individuals seek decisions from the courts, if not completely overturn existing laws anyway.

So yes.

Senator Hatch. From a standpoint of homosexual rights, the ERA would definitely accord them an array of new constitutional rights as homosexuals?

Is that a fair statement?

Mr. Hickok. Yes.

Mr. Marcin. Yes; one who is concerned with the tone of society might not want to see the ERA broadly interpreted and yet that same person might care about certain rights for homosexual citizens.

Senator Hatch. There may be people who would like to see greater rights and freedoms given to homosexuals but still may not want these to be mandated by the Federal courts.

On the other hand, if gaining greater rights and privileges is their main concern then they may be for the ERA without question, because it would apparently provide strong legal ammunition for these rights and privileges?

Mr. MARCIN. I think if they care about an immediate social——

Senator HATCH. Transformation?

Mr. MARCIN. Change, they would favor the ERA. If they cared about recognition of rights of homosexual citizens in a measured, well thought out setting, they may prefer the legislative route rather than the ERA route.

Senator HATCH. What you are saying is that some might think it better to pursue a measured gradualist approach to resolve these issues than to suddenly implement what could be a radical change that would results in perpetual litigation.

What about national security interests? There has been an argument that one of the problems with homosexuals is that they may be subject to intimidation, blackmail, and a variety of other social pressures to the degree that they may be national security risks. Now, I am not sure that is right or wrong. That is not the issue here.

What effect would the ERA have with regard to the rights of homosexuals to have access to the military or national security information in this Government?

Do you want to start, Professor Hickok?

Mr. HICKOK. I would think it would make—the Government would have to demonstrate a very compelling interest at stake in this case to be able to take exceptions to the general rule.

Senator HATCH. The Government would need to have a compelling interest to be able to foreclose homosexuals generally from having access to top secrets? That would be a difficult burden.

Mr. HICKOK. I would think so.

Senator HATCH. Do you agree with that, Professor Marcin?

Mr. MARCIN. Yes; and more than that, I think if the Court were to take an absolutist approach to the meaning of the ERA, a very literal approach——

Senator HATCH. And you indicated they probably will.

Mr. MARCIN. I am not sure I have indicated that. I think I have indicated that the Court would take a very free approach.

Senator HATCH. I understand.

Mr. MARCIN. But if the Court were to do that, it would be faced with some difficult precedents, that is, the steel seizure case back in the late 1940's in which the Supreme Court held that there is no national emergency exception to constitutional provisions. You cannot simply read into the Constitution some national emergency exception whereby people can automatically be deprived of constitutional rights simply because an emergency is going on. And if we take an absolutist approach we are faced with that fact. There is no exception. If we take the flexible approach, we are led into the position that the Government can engage in discrimination on account of sex when it has a compelling reason for doing so but the definition of "compelling" in the Supreme Court's equal protection cases is very difficult to satisfy.

Senator HATCH. This has been a very interesting hearing.

In addition to the Yale Law Journal article, a wide number of constitutional scholars have observed that the ERA may well mandate the legalization of homosexual marriage: Prof. James White, professor of constitutional law, University of Michigan; Prof. Paul Freund, professor of constitutional law at Harvard University; Rita

Hauser, former U. S. Representative to the International Human Rights Commission; Prof. Barbra Babcock, professor of law at Stanford University; Prof. Paul Kurtz, professor of law at the University of Georgia; and Prof. Grover Rees, professor at the University of Texas Law School, to name a few of the distinguished scholars.

So this is not as simple an issue as people have thought. The ERA involves more than simply an equal pay for equal work issue. It is an issue that involves potentially massive transfers of power to the judiciary in this country away from the Congress, away from the States. It is an issue where no one truthfully knows where we are going, except that the changes required could be radical ones.

That is why we are holding these particular hearings: To explore the constitutional implications of the equal rights amendment and to attempt to discern what precisely the equal rights amendment means.

Our next hearing will be on June 22 on the subject of the impact of the ERA on family law. We think it is a particularly important hearing and we are looking forward to it.

In closing, I want to thank both of your for the articulate and intelligent testimony that you have given us today.

So we are grateful to you for the efforts you have put forth and I think that the Congress is in your debt. Hopefully, when we debate the ERA this time we can do so with greater enlightenment than we have had in the past.

So I want to thank you again. We will recess until further notice.

Thank you.

[Whereupon, at 11 a.m., the subcommittee was recessed, to reconvene subject to the call of the Chair.]

[The following was received for the record:]

MISCELLANEOUS MATERIAL

The Legality of Homosexual Marriage

Two men recently petitioned the Minnesota Supreme Court to compel the state to grant them a marriage license.[1] The court rejected their application for mandamus, and their appeal was subsequently dismissed by the United States Supreme Court.[2] But the claim was far from frivolous. A credible case can be made for the contention that the denial of marriage licenses to all homosexual couples violates the Equal Protection Clause of the Fourteenth Amendment.[3] There are serious difficul-

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[1] Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (Minn. Sup. Ct., 1971), *appeal dismissed*, 41 U.S.L.W. 3167 (U.S. Oct. 10, 1972). Petitioners had applied for a marriage license under MINN. STAT. ANN. § 517.01 (1969), which does not specify the sex of the applicants:

> Marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage hereafter may be contracted only when a license has been obtained therefor as provided by law and when such marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom the parties in good faith believe to be authorized, so to do.

The clerk of the court declined to issue the license on the sole ground that petitioners were of the same sex.

[2] Baker v. Nelson, 41 U.S.L.W. 3167 (U.S. Oct. 10, 1972).

[3] In addition to their Fourteenth Amendment argument, petitioners in Baker v. Nelson also based their claim on a variety of other constitutional provisions, including the First, Eighth, and Ninth Amendments. Although the arguments under these provisions raise some interesting legal issues, they probably cannot be sustained under existing court precedent.

The First Amendment right to free speech and free assembly, as construed by the Supreme Court, includes a number of other rights, among them the right to engage in free and private associations. Williams v. Rhodes, 393 U.S. 23 (1968); Elfbrandt v. Russell, 384 U.S. 11 (1966); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963); NAACP v. Alabama, 357 U.S. 449 (1958).

Justice Douglas, writing for the Court in Griswold v. Connecticut, 381 U.S. 479 (1965), referred to the right of association as one of the "penumbras formed by emanations from those guarantees [specified in the Bill of Rights] that help give them life and substance." *Id.* at 484. Douglas' discussion of marriage is particularly significant:

> Marriage is a coming together for better or for worse, hopefully enduring and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. at 486.

However, the Supreme Court has never specifically declared the marriage unit to be an association within the terms of the First Amendment. Most right of association cases to date have dealt with associations organized for political purposes, and moreover, with existing associations rather than the formation of new ones.

Petitioners' Eighth Amendment claim was premised on the assertion that the denial of their right to marriage constituted punishment for a status or condition which they were powerless to change. They based their argument chiefly on the Supreme Court's decision in Robinson v. California, 370 U.S. 660 (1962), in which the Court struck down a state law under which a narcotics addict was sentenced to ninety days' imprisonment on the ground that to condemn a person for "an illness, which may be contracted innocently or involuntarily" constituted cruel and unusual punishment. *Id.* at 667. But *Robinson* concerned punishment for a "crime"; even Justice Fortas' liberal interpretation of *Robinson*, set forth in his dissent in Powell v. Texas, 392 U.S. 514, 567 (1968), does not extend the holding beyond the context of criminal sanctions.

Petitioners' Ninth Amendment claim was apparently based upon Justice Goldberg's ties with this equal protection analysis, which make it questionable whether courts will uphold it under current precedent. Their claim, however, would almost certainly be vindicated under the proposed Equal Rights Amendment, which would establish a stricter prohibition against discriminatory treatment along sexual lines. This Note will first examine the constitutionality of restricting marriage licenses to heterosexual pairs under traditional equal protection doctrine, and will then turn to the implications of the Equal Rights Amendment for this practice.

I. The Fourteenth Amendment

It is by now well established that the Supreme Court varies the degree of scrutiny to which it subjects legislative classifications according to the groups and interests affected by any given classification.[4] The so-called "strict scrutiny" standard is usually triggered by legislation which either contains a classification that is suspect because of the nature of the group disadvantaged, or threatens a "basic civil right of man."[5] When this standard is employed, the government is required

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concurring opinion in Griswold v. Connecticut, 381 U.S. 479, 488-97 (1965). Justice Goldberg there contended that the Ninth Amendment was inserted into the Bill of Rights to protect from federal infringement certain fundamental rights not otherwise mentioned (*e.g.*, in *Griswold*, the right to marital privacy). He argued that at least some of these fundamental rights, like some of the rights protected by the first eight amendments, were made applicable to the states by the Due Process Clause of the Fourteenth Amendment.

With this interpretation in mind, it might be argued that the Ninth Amendment shields the right to marry from governmental interference. Tangential support for this contention could be derived from Loving v. Virginia, 388 U.S. 1 (1967), in which the Court held that the right to marry was fundamental and that denial of that right on racial grounds violated the Due Process Clause. *Id.* at 12. However, it is doubtful that the Ninth Amendment significantly contributes to the resolution of this constitutional problem. If the right to marry persons of the same sex is fundamental and is not counterbalanced by important state interests, then an argument based on the Fourteenth Amendment, *infra* pp. 574-83, should carry Baker and McConnell's case. If not, the Ninth Amendment case can hardly stand on its own.

[4] *See, e.g.*, Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural Law—Due Process Formula,"* 16 U.C.L.A.L. Rev. 716, 739-46 (1969); Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969); Note, *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065 (1969); Note, *The Supreme Court, 1969 Term*, 84 Harv. L. Rev. 1, 60-71 (1970).

[5] Every classification, other than racial, which has been found to be suspect by the Court has been considered in the context of an important constitutional right. In the cases in which wealth/poverty distinctions were overturned, the rights infringed included voting (Harper v. Virginia Board of Elections, 383 U.S. 663 (1966)), the right to adequate appellate review (Griffin v. Illinois, 351 U.S. 12 (1956)), and the right to representation during such review (Douglas v. California, 372 U.S. 353 (1963)). Carrington v. Rash, 380 U.S. 89 (1965), in which the impermissible classification was between military and civilian members of a community, dealt with the right to vote; Shapiro v. Thompson, 394 U.S. 618 (1969), outlawing discrimination on the basis of residency for welfare recipients, centered on the right to travel. Thus, while the inherently unfair nature of a classification against a group is important and may be sufficient inde-

to prove the presence of a "pressing public necessity" to justify such classification.[6]

In actual practice, the Court has applied the full strict scrutiny standard only rarely outside the context of racial discrimination.[7] In cases involving non-racial classifications, the Court's approach can more realistically be viewed as a balancing process, perhaps best articulated by Justice Marshall in his dissenting opinion in *Dandridge v. Williams*:

> In my view equal protection analysis of this case is not appreciably advanced by the *a priori* definition of a "right," fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.[8]

There are thus three basic factors to be balanced: the degree to which legislative classifications disfavoring homosexuals should be "suspect," because of legislative motivation; the importance of obtaining marriage licenses to homosexuals as a class; and the interests of the government in denying such licenses to all same-sex couples.

A. *Suspect Classification*

The Supreme Court has never explicated its grounds for declaring certain classifications to be inherently suspect. However, examination of the classifications thus far held to be suspect does reveal certain common denominators which may have motivated the Court in so designating them.

Judge J. Skelly Wright expressly articulated one relevant criterion when he observed that classifications disfavoring "a politically voice-

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pendently to render a classification suspect, *see, e.g.*, McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969) (dicta), the nature of the right infringed by that classification is often crucial in determining whether the Court will apply its stricter standard. *See* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

[6] Korematsu v. United States, [illegible] U.S. 214, 216 (1944).

[7] One such case is Levy v. Louisiana, 391 U.S. 68 (1968), in which the denial to illegitimate children of the right to sue under a state wrongful death statute was held unconstitutional. Other strict scrutiny cases, while superficially turning upon non-racial classifications, have heavy racial overtones. *See, e.g.*, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (poll tax requirement for voting found to discriminate against the poor); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948) (state statute barring issuance of fishing licenses to persons "ineligible to citizenship" held to violate the Fourteenth Amendment. The Court observed that the "Japanese are among the few groups still not eligible." *Id.* at 412 n.1).

[8] 387 U.S. 471, 520-21 (1970).

less and invisible minority" should be subjected to "closer judicial surveillance and review."[9] Homosexuals as a group would appear to have no more political influence than the black and poor minorities with which Judge Wright was dealing.[10]

Classifications have also been found suspect when they are based on attributes which are inherent in the individual and wholly, or largely, beyond his control.[11] Whatever the causes of homosexuality, the orientation itself does not appear to be one that is freely chosen, nor in most instances can it be changed.[12] Groups which are the subjects of derogatory myths of stereotypes are among those which have been accorded the protection of the strict scrutiny standard, perhaps in part to insure that such stereotypes do not become the bases for legislative classification.[13] Certainly disparaging misconceptions about homosexuals are endemic in Western society.[14]

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[9] Hobson v. Hansen, 269 F. Supp. 401, 508 (D.D.C. 1967), *remanded on other grounds sub nom.* Smuck v. Hobson, 402 F.2d 175 (D.C. Cir. 1969). Judge Wright's comments, made in the context of de facto school segregation, read in full:

> Judicial deference to these [legislative and administrative] judgments is predicated in the confidence courts have that they are just resolutions of conflicting interests. This confidence is often misplaced when the vital interests of the poor and racial minorities are involved. For these groups are not always assured of a full and fair hearing through the ordinary political process, not so much because of the chance of outright bias, but because of the abiding danger that the power structure—a term which need carry no disparaging or abusive overtones—may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. Those considerations impel a closer judicial surveillance and review of administrative judgments adversely affecting racial minorities, and the poor, than would otherwise be necessary.

Id. at 507-08.

While Judge Wright mentioned specifically only two groups—the poor and racial minorities—shut out by the power structure, he did not preclude the existence of others similarly disadvantaged. Professor Karst has explicated the decision in Williamson v. Lee Optical Co., 348 U.S. 483 (1955), in which a statute requiring opticians to receive written prescriptions from ophthalmologists or optometrists before duplicating or replacing lenses was upheld, in terms that buttress this notion:

> In *Williamson*, the losers in the legislature were not permanently disadvantaged minorities. The opticians might well have anticipated new legislative alliances that would soften the impact of this legislation by amendment.

Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural Law—Due Process Formula,"* 16 U.C.L.A.L. Rev. 716, 724 (1969).

[10] No publicly declared homosexual has been elected to any significant position of power in the United States. In fact, hostility is manifest even to the expression of views espousing civil liberties for homosexuals. *See, e.g.*, the comments of Judge Stevenson in McConnell v. Anderson, 451 F.2d 193, 196 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972).

[11] *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944) (classification disfavoring Japanese). *See also* Levy v. Louisiana, 391 U.S. 68 (1968) (classification disfavoring illegitimate children); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (classification disfavoring persons "ineligible to citizenship").

While it is true that some classifications found to be suspect, such as poverty or military status, are not wholly immutable or beyond the plaintiffs' control, they still represent statuses which are not always freely chosen or easily discarded.

[12] *See* I. BIEBER AND ASSOCIATES, HOMOSEXUALITY: A PSYCHOANALYTIC STUDY 301, 310-19 (1962). For a recent discussion of the sociological and psychiatric debate centered on the concept of homosexuality as a disease which can be cured, see A. KARLEN, SEXUALITY AND HOMOSEXUALITY 572-606 (1971).

Perhaps most importantly, a history of discrimination, both public and private, seems to characterize the groups granted this special judicial status.[15] Discrimination against homosexuals[16] represents a cultural theme in Western society which dates back to Biblical days.[17] Such disrimination arguably has been at least as burdensome as that which has afflicted several of the minorities (including aliens and the poor) which have been shielded on occasion by the stricter judicial standard of review. However, the Court might reasonably find that discrimination against homosexuals has not been as burdensome as that affecting other minority groups, particularly blacks.

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[13] It is arguable that special fears born of racial prejudice encouraged the perception of Japanese-Americans as a potential threat during the Second World War, leading to the internment camps and *Korematsu*, while Caucasians of German or Italian descent were left relatively undisturbed. *See* Rostow, *The Japanese-American Cases—A Disaster*, 54 Yale L.J. 489, 496 (1945). Stereotypes also played a role in the controversy over the poll tax, which was ruled unconstitutional in Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), over the dissent of Justice Black:

> The Court gives no reason at all to discredit the long-standing beliefs that making the payment of a tax prerequisite to voting is an effective way of collecting revenue and that people who pay their taxes are likely to have a far greater interest in their government . . . .

Id. at 677. The Court majority, in finding suspect the wealth-poverty classification in *Harper*, may well have been expressing its belief that the poor had suffered too long from the "long-standing beliefs" mentioned by Justice Black.

[14] *See generally* Taylor, *Historical and Mythological Aspects of Homosexuality*, in Sexual Inversion 140-64 (J. Marmor ed. 1965). Common misconceptions abound; one is that homosexuals are disposed to pedophilia, *see* M. Schofield, Sociological Aspects of Homosexuality 149 (1965); D. West, Homosexuality 114-20 (1967), and sources therein cited; another is that they predominate in certain social classes or professions, *see* Report of the Committee on Homosexual Offenses and Prostitution 17 (1957) [hereinafter cited as Wolfenden Report]; a third is that most male homosexuals are effeminate, *see* M. Hoffman, The Gay World 180-86 (1968), and that most female homosexuals are over-masculine, *see* Martin & Lyon, *The Realities of Lesbianism*, in The New Women (J. Cooke, C. Bunch-Weeks & R. Morgan eds. 1970), 79-80.

[15] *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1879) (state denial to Negro citizens of right to serve on juries held to violate the Fourteenth Amendment):

> This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy.

Id. at 306.

[16] One of the most serious areas of discrimination has been in the area of federal employment. *See generally* Note, *Dismissal of Homosexuals from Government Employment: The Developing Role of Due Process in Administrative Adjudications*, 58 Geo. L.J. 632 (1970); Note, *Government-Created Employment Disabilities of the Homosexual*, 82 Harv. L. Rev. 1738 (1969); Note, *Is Governmental Policy Affecting the Employment of Homosexuals Rational?*, 48 N.C.L. Rev. 912 (1970).

The Civil Service Commission, while tolerating other instances of "sexual misconduct" such as adultery, once applied strict standards to homosexual behavior because of what it perceived to be widespread public repugnance to homosexuality. *See* Note, *Government-Created Employment Disabilities of the Homosexual*, *supra*, at 1741-43. Such overt discrimination has since been modified as a result of Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969), in which the District of Columbia Court of Appeals held that there must be a specific connection between an employee's conduct and the efficiency of the civil service before such an employee could be dismissed.

[17] Early aversion to homosexuality is seen in the Torah. *See Leviticus* 18:22, 20:13. The Talmudic law codes, relying on Biblical references, further elaborated the laws of sodomy. *See, e.g.*, Mishnah, Sanhedrin VII, 4.

These codes were transmitted to the Christian church by its early leaders, particularly St. Paul. A. Kinsey, W. Pomeroy, C. Martin & P. Gebhard, Sexual Behavior in the Human Female 482 (1953). *See generally* D. Bailey, Homosexuality and the Western Tradition (1955). By the late Middle Ages, homosexuality was identified with heresy and often punishable by death. Modern views have modified but not erased this hostile attitude. *See* A. Karlen, *supra* note 12, at 1-39, 44-62, 66-81, 85-99; T. Szasz, The Manufacture of Madness ch. 10 (1970); Taylor, *supra* note 14, *passim*.

B. *The Interests of Homosexuals*

With respect to the second element in the balance—the importance of marriage licenses to homosexuals—Court precedent is again of little help. Even in the heterosexual context, the Supreme Court has never specifically ruled that marriage, standing alone, is a sufficiently fundamental right to elicit use of the strict scrutiny standard. However, the plausibility of such a holding is evident from a variety of cases. In the context of the Due Process Clause of the Fourteenth Amendment, the Court has stated that the right to marry is "one of the vital personal rights essential to the orderly pursuit of happiness by free men . . . one of the 'basic civil rights of man,' fundamental to our very existence."[18] This fact was found to be crucial to the Court's conclusion that anti-miscegenation statutes deprive interracial couples of due process of law.[19] The Court's plurality opinion in *Griswold v. Connecticut*[20] again stressed the fundamental nature of the marriage relationship, noting that it draws special protection from a variety of constitutional safeguards, including the right of association.[21] Most importantly, in *Skinner v. Oklahoma*,[22] the progenitor of strict scrutiny cases, the Court held that the state's sterilization statute required use of that more stringent standard in an equal protection context because of the fundamentality of "[m]arriage and procreation."[23]

However, even explicit judicial recognition of marriage as a fundamental interest to a heterosexual couple would not prove a fortiori that homosexuals have interests of a comparable magnitude in being permitted to obtain marriage licenses. *Skinner* is not alone among Supreme Court cases in linking marriage with procreation when considering the importance of those rights.[24] It is unlikely, in light of Court dicta[25] and of the evolving attitudes toward marriage in our society, that constitutional protections surrounding the institution of marriage would be made dependent on the ability or willingness to bear children.[26] But it is still true that part of the importance of the marriage license to heterosexual couples derives from the social acceptance and legal protection which it guarantees for their natural children.[27] Such considerations would not apply to a same-sex pair.

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[18] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[19] *Id. See also* Meyer v. Nebraska, 262 U.S. 390 (1923), which stated in dicta that marriage is part of that "liberty" protected by the Due Process clause because it is "essential to the orderly pursuit of happiness by free men." *Id.* at 399. *See also* Boddie v. Connecticut 401 U.S. 371 (1971) (due process forbids denial of access to divorce courts because of inability to pay court fees and costs). The holding was based in part upon "the basic position of the marriage relationship in this society's hierarchy of values." *Id.* at 374.

[20] 381 U.S. 479 (1965).

[21] *Id.* at 486. *See* note 4 *supra*.

[22] 316 U.S. 535 (1942).

[23] *Id.* at 541. *See also* United States v. Kras, 41 U.S.L.W. 4117, 4121 (U.S. Jan. 10, 1973) (dicta).

On the other hand, state sanctioning of the marriage relationship brings with it numerous other legal, social and even psychic benefits which are of undiminished importance to homosexuals. Married individuals enjoy substantial tax benefits,[28] tort recovery for wrongful

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[24] *Skinner* states that the two rights together are "fundamental to the very existence of the race." 316 U.S. at 541. The Court implied a similar connection in Meyer v. Nebraska, 262 U.S. 390, 399 (1923):

> The liberty thus guaranteed [by the Fourteenth Amendment] . . . denotes . . . freedom . . . to marry, establish a home and bring up children.

[25] *See* the characterization of marriage by Justice Douglas in Griswold v. Connecticut, 381 U.S. 479, 486 (1965), set forth in note 4 *supra*.

[26] The Minnesota Supreme Court in *Baker* itself recognized that any attempt by the state to require such intent might be both unworkable and unconstitutional. 291 Minn. at 313-14, 191 N.W.2d at 187.

[27] *See, e.g., 1971 Midyear Reports and Recommendations of the Family Law Section to the ABA House of Delegates on the Uniform Marriage and Divorce Act*, 5 FAMILY L.Q. 133 (1971), and *The Uniform Marriage and Divorce Act*, *id.* at 205. Note that the present draft of the act provides for both maintenance and child support. *Id.* at 233-35. The *Baker* court's reason for denying mandamus to the petitioners was that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis." 291 Minn. at 312, 191 N.W.2d at 186.

[28] Benefits available under the present federal income tax law, for example, include: *Joint Returns.* INT. REV. CODE OF 1954, § 6013(a) provides that "A husband and wife may make a single return jointly of income taxes under subtitle A, even though one of the spouses has neither gross income nor deductions . . . ." *See id.* at § 1 for rate of tax. In addition to the general advantage of factoring two incomes of different amounts into a single tax return, there are instances of joint returns being given other preferential treatment. *See, e.g., id.* at § 179(b) (with regard to additional first year depreciation allowance for small business, the ordinary limitation of $10,000 is raised to $20,000 for husband and wife filing jointly); *id.* at § 1244(b) (with regard to losses on small business stock, loss from the sale or exchange of an asset which is not a capital asset shall not exceed $25,000 or $50,000 in case of husband and wife filing joint returns); *id.* at § 121 (if taxpayer has attained age of 65, gross income does not include gain from the sale or exchange of property). For husband and wife filing a joint return, even though only one spouse satisfies the age requirement, both shall be treated as satisfying it; *id.* at § 37(i)(2)(A) (similar provision for retirement income).

Deductions. Spouses are allowed deductions for each other as dependents in certain instances. *See* INT. REV. CODE OF 1954, § 214 (when incapacitated or institutionalized); *id.* at § 213 (for medical expenses not compensated by insurance); *id.* at § 151 (generally, $750 and an additional $750 if one is blind).

However, certain provisions of the Internal Revenue Code potentially disfavor married people. *See, e.g.,* INT. REV. CODE OF 1954, § 1239(a) provides that the gain from the sale of certain property between spouses is not considered a capital gain; *id.* at § 46(a)(4) (with regard to computing credit for investment in certain depreciable property, married individuals filing separate returns normally have only a $12,500 limitation per individual death,[29] intestate succession,[30] and a host of other statutory and common law privileges.[31] They also incur special liabilities, such as the responsibility for support[32] and maintenance[33] during marriage and for similar provision after divorce,[34] which may on balance be viewed as beneficial by a couple regardless of sexual orientation.[35] Beyond these strictly legal benefits, the formal status of marriage might reasonably be viewed as enhancing the stability, respectability, and emotional depth of any relationship between two individuals, regardless of whether the relationship is homosexual or heterosexual.[36]

C. *The Interests of the Government*

Against the interests of homosexuals and the suspect nature of classifications disfavoring them must be placed the interests of the government in uniformly denying marriage licenses to same-sex couples. One possible argument against any official attempt to normalize the

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instead of $25,000); *id.* at § 48(c)(2)(B) (with regard to limitation on deductible cost of used property there is a $25,000 ceiling for married persons filing separately instead of the normal $50,000); *id.* at § 141 (standard deduction normally shall not exceed $2,000, but for a married person filing separately, it shall not exceed $1,000). *See also* Richards, *Discrimination Against Married Couples under Present Income Tax Laws*, 49 TAXES 526 (1971); Richards, *Single v. Married Income Tax Returns under the Tax Reform Act of 1969*, 48 TAXES 301 (1970).

[29] Coliseum Motor Co. v. Hestor, 43 Wyo. 298, 305, 3 P.2d 105, 106 (1931).

[30] *See, e.g.*, CONN. GEN. STAT. REV. § 46-12 (Supp. 1969).

[31] Other benefits of legally sanctioned marriage include employee's family health care, group insurance, and social security survivor's benefits. Automobile insurance premiums are often lower for married people. *See generally* L. KANOWITZ, WOMEN AND THE LAW 35-93 (1969); H. KYRK, THE FAMILY IN THE AMERICAN ECONOMY (1953); J. MADDEN, THE LAW OF PERSONS AND DOMESTIC RELATIONS (1931). All benefits mentioned in this section which distinguish unfairly on the basis of sex may be subject to the effects of the Twenty-seventh Amendment if ratified. *See* p. 583 *et seq. infra.*

[32] At common law and under various statutes the husband is bound to support his wife. *See, e.g.*, In Re Fawcett's Estate, 232 Cal. App. 2d 770, 777, 43 Cal. Rptr. 160, 165 (1965).

[33] The husband is primarily liable for necessaries furnished to his wife. *See, e.g.*, Cromwell v. Anderson Furniture Co., 195 A.2d 264, 265 (D.C. Ct. App. 1963). *See also* Wanderer, *Family Expense Legislation as Affecting Common Law Liability of Husband for Necessaries*, 68 COM. L.J. 56 (1963).

[34] *See, e.g.*, Rambo v. Rambo, 155 So. 2d 817 (Fla. App. 1963).

[35] While some observers condemn the strictures of such laws, it cannot be denied that they often act to preserve the marriage relationship or at least insure that its break-up will follow an orderly pattern. *See Reports and Recommendations on the Uniform Marriage and Divorce Act* and *The Uniform Marriage and Divorce Act*, *supra* note 27.

[36] *See* E. GRIFFITH, MARRIAGE AND THE UNCONSCIOUS 12 (1957); E. JAMES, MARRIAGE AND SOCIETY 204 (1952); A. MEARES, MARRIAGE AND PERSONALITY 7-8 (1958). *See also* New Jersey Welfare Rights Organization v. Cahill, 41 U.S.L.W. 1059 (U.S. Oct. 4, 1972), in which the Court observed that nonceremonial marriages lack "the aura of permanence that is concomitant with" ceremonial marriages and often do not provide "the stability necessary for the instillment" of proper social norms. *Id.* at 1059. Since few clergies are presently willing to marry a same-sex couple, the state's refusal to grant marriage licenses to such couples effectively deprives most of them of either a religious or a secular marriage ceremony.

homosexual relationship is that the government's approach toward homosexuality should be one of treatment and rehabilitation rather than tolerance and legalization. However, the implied assumption that most homosexuals can be "cured" is now widely questioned.[37]

Another possible state interest lies in preventing an increase in the incidence of homosexuality among adolescents. However, it is highly questionable whether anyone can freely select his sexual orientation on the basis of comparative legal advantages.[38] Moreover, those countries which have legalized homosexual activity between consenting adults have recorded no perceptible increase in the incidence of homosexuality since such legalization.[39]

Perhaps the most telling argument which the state might raise to justify the denial of marriage licenses to homosexual couples is that issuance of such licenses would run counter to the existing laws in many states against homosexual acts.[40] It is undoubtedly true that the legalization of homosexual marriage would put the states in the anomalous position of officially sanctioning a relationship which is very likely to encourage the commission of illegal sex acts. However, it should be noted that such statutes—forbidding specified sexual activities between consenting adults in the privacy of their home—are very possibly unconstitutional.[41] In any case, they are rarely enforced, even against homosexuals.[42]

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[37] *See* WOLFENDEN REPORT, *supra* note 14, at 25-30. For a more recent examination of this continuing controversy and a discussion of the literature, *see* A. KARLEN, *supra* note 12, at 572-606. Even the most optimistic psychotherapists rarely put the "cure" rate at above one-third of the willing patients. A. KARLEN, *supra* note 12, at 572.

[38] BIEBER AND ASSOCIATES, *supra* note 12, at 310-19.

[39] H. HYDE, THE LOVE THAT DARED NOT SPEAK ITS NAME 289 (1970). THE WOLFENDEN REPORT, *supra* note 14, at 24, noted that in Sweden where reforms of laws dealing with homosexual acts had been instituted some time before, there had been no noticeable increase in homosexual activity over a ten-year period. In fact, it has been suggested that, to the extent that legalization may lessen some of the problems of homosexual life and make for more stable, long-term relationships, the amount of homosexual proselytizing of minors may well *decrease* in the wake of such reforms. *See* E. SCHUR, CRIMES WITHOUT VICTIMS 111 (1965). For the same reason, a similar decrease might follow the legalization of homosexual marriage.

[40] A similar argument was accepted in New Jersey Welfare Rights Organization v. Cahill, 41 U.S.L.W. 1059 (U.S. Oct. 4, 1972), in which the Court justified the restriction of "Aid to Families of the Working Poor" to ceremonially married couples on the ground *inter alia* that the state has a proper and compelling interest in refusing to subsidize a living unit that encourages the violation of laws against fornication and adultery.

[41] Such an argument might be based on the right to privacy as developed in such cases as Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Georgia, 394 U.S. 557 (1969); and Griswold v. Connecticut, 381 U.S. 479 (1965). *See* Note, *Homosexuality and the Law*, 17 N.Y.L.F. 273, 295-96 (1971).

[42] It is estimated that there are twenty convictions for every six million homosexual acts. Fisher, *The Sex Offender: Provisions for the Proposed New Maryland Criminal Code: Should Private, Consenting Adult Homosexual Behavior Be Excluded?,*

A final state interest which should be mentioned is of a more theoretical nature. The vast majority of Americans view marriage to be *by definition* a union of man and woman; a scarcely smaller number see homosexuality as "unnatural" and morally reprehensible.[43] The easy answer to these propositions is that the Fourteenth Amendment was passed for the express purpose of preventing the enforcement of exclusionary classifications based upon deeply felt beliefs which are not grounded on objective, rational distinctions. Not long before the passage of that Amendment, thousands of Americans sincerely believed that a voter was "by definition" a white, male, property owner, and that interracial marriages were immoral. Despite this argument, however, society's basic institutional conceptions must inevitably carry some weight in the balance of interests, even though they may not suffice alone to justify the denial of concrete legal benefits to those whose conceptions differ.[44]

D. *Interests in the Balance*

In light of the difficulties with the equal protection analysis, it appears doubtful that classifications infringing upon homosexual marriage will receive the penetrating scrutiny evidenced in cases dealing with racial discrimination or with established fundamental interests such as criminal justice and the vote. Discrimination against homosexuals, while pervasive, has not involved the degree of government complicity which was largely responsible for the development of the strict scrutiny standard. Similarly, the interests of homosexuals in obtaining marriage licenses, while not inconsiderable, are not fully comparable to the corresponding interests of heterosexuals, which have not yet themselves formally attained the status of a "fundamental right" in the equal protection context.

However, even if strict scrutiny is not expressly applied to this issue,

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30 Md. L. Rev. 91, 95 (1970). *See generally Project: The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A.L. Rev. 643, 689, 734-42 (1966).

[43] As an indicator of this attitude, it should be noted that in most states, offenses described in the sodomy statutes are characterized by such terms as "abominable," "detestable," or "unnatural." Cantor, *Deviation and the Criminal Law*, 55 J. Crim. L.C. & P.S. 441, 446 (1964). *See also* note 17 *supra*.

[44] A stronger position is taken in P. Devlin, The Enforcement of Morals 20 (1959): "[S]ociety is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions." For a critique of this position, *see* H.L.A. Hart, *Immorality and Treason*, 62 Listener 163 (1959). The Devlin-Hart controversy has been discussed extensively. *See, e.g.*, Anastaplo, *Law and Morality: On Lord Devlin, Plato's Meno, and Jacob Klein*, 1967 Wis. L. Rev. 231; Blackshield, *The Hart-Devlin Controversy in 1965*, 5 Sydney L. Rev. 441 (1967); Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 Yale L.J. 986 (1966).

the Court would not be justified in falling back upon the simple "rationality" test which it developed primarily for the protection of economic interests.[45] Rather, in accordance with Justice Marshall's articulation, the Court should balance the conflicting interests of the state and homosexuals, taking into consideration the danger that legislative classifications disfavoring homosexuals may in fact be based upon prejudice and misinformation about the nature of that condition.

II. The Equal Rights Amendment

The Court's decision that the denial of marriage licenses to homosexuals does not abridge existing equal protection law would not save that practice from attack under the proposed Twenty-seventh Amendment. The version of the Amendment which is now before the states for ratification[46] declares, in relevant part, that "Equality of rights under law shall not be denied or abridged by the United States or by any State on account of sex."[47] The legislative history of the Amendment clearly supports the interpretation that sex is to be an impermissible legal classification, that rights are not to be abridged on the basis of sex.[48] A statute or administrative policy which permits a man to marry a woman, subject to certain regulatory restrictions, but categorically denies him the right to marry another man clearly entails a classification along sexual lines.

The possibility that such a classification would violate the Equal Rights Amendment was raised during both the congressional hearings and debates on that proposal.[49] The Amendment's chief sponsor in the

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[45] For cases applying the rationality test, see Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911).

[46] The Equal Rights Amendment was passed by Congress on March 23, 1972. 118 Cong. Rec. H. 2423 (daily ed. March 23, 1972). Less than two hours after the Senate acted, Hawaii became the first state to ratify the amendment. Congressional Quarterly 692 March 25, 1972. It will become effective two years after its ratification by a minimum of thirty-eight states.

[47] H.R.J. Res. 208, S.R.J. 8 92d Cong., 1st Sess. (1971).

The first attempt at an equal rights amendment was the 1923 version: "Men and women shall have equal rights throughout the United States and in every place subject to its jurisdiction. Congress shall have power to enforce this article by appropriate legislation." H.R.J. Res. 75. 68th Cong., 1st Sess. (1923).

[48] *See, e.g.*, 118 Cong. Rec. § 4561 (daily ed. March 22, 1972) (remarks of Senator Stevenson, co-sponsor of the amendment):

> There is but one principle involved . . . sex, by and of itself cannot be used as a classification to deny or abridge any person of his or her equal rights under the law.

[49] *See* 118 Cong. Rec. § 4372 (daily ed. March 21, 1972) (remarks of Senator Ervin):

> Now, Mr. President, the idea that this law would legalize sexual activities between persons of the same sex or the marriage of persons of the same sex did not originate with me. I do not know what effect the amendment will have on laws which make homosexuality a crime or on laws which restrict the right of a man to marry another man or the right of a woman to marry a woman or which restricts the

Senate, Birch Bayh, rejected that interpretation, reasoning that a prohibition against homosexual marriage would not constitute impermissible discrimination so long as licenses were denied equally to both male and female pairs.[50] Senator Bayh's opinion should, of course, be given considerable weight in determining the legislative intent in phrasing and passing the Equal Rights Amendment.[51] However, it cannot be seen as controlling unless it is at least reasonably consistent with established constitutional doctrine and the more general interpretation of the proposed Amendment as evidenced in the legislative history.

As Professor Paul Freund observed during the congressional debates, the Bayh reasoning runs counter to the Supreme Court's handling of the anti-miscegenation statutes under the Fourteenth Amendment.[52] In *Loving v. Virginia*,[53] the Court ruled that a marriage license cannot be denied merely because the applicants are of different races. Such a denial was deemed to be an impermissible racial classification, even though it affected the races equally.[54]

In light of the frequently asserted claim that the Equal Rights Amendment was designed to prohibit sex discrimination to at least

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> right of a woman to marry a man. But there are some very knowledgeable persons in the field of constitutional law . . . who take the position that if the equal rights amendment becomes a law, it will invalidate laws prohibiting homosexuality and laws which permit marriages between men and women.

See also 118 Cong. Rec. § 4373 (daily ed. March 21, 1972) (remarks of Senator Ervin, quoting the testimony of Professor Paul Freund before the Judiciary Committee during hearings on the Amendment):

> Indeed, if the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation. Whether the proponents of the amendment shrink from these implications is not clear.

[50] 118 Cong. Rec. § 4389 (daily ed. March 21, 1972):

> The equal rights amendment would not prohibit a State from saying that the institution of marriage would be prohibited to men partners. It would not prohibit a State from saying the institution of marriage would be prohibited from two women partners. All it says is that if a State legislature makes a judgment that it is wrong for a man to marry a man, then it must say it is wrong for a woman to marry a woman—or if a State says it is wrong for a woman to marry a woman, then it must say that it is wrong for a man to marry a man.

Another of the Amendment's principal supporters, Professor Thomas Emerson of Yale Law School, has also expressed his belief that the Equal Rights Amendment was not intended to force the states to grant marriage licenses to homosexual couples and would not be so construed by the courts. Letter on file with the *Yale Law Journal.*

[51] It should be noted, however, that various legislators dispute the importance of legislative history as a guide to interpretation of the Equal Rights Amendment. *See, e.g., Hearings on H.J. Res. 35, 208 Before Subcomm. no. 4 of the House Comm. on the Judiciary,* 92d Cong., 1st Sess. 75 (1971) (remarks of Representative Wiggins, paraphrasing the position of Senator Ervin):

> The Senator just made the point that the Court at some future time will look at the words of the statute itself or the amendment itself and will not look to the legislative history, one of the reasons being that the States are not ratifying legislative history. They are ratifying the language itself.

[52] *See* note 49 *supra.*

[53] 388 U.S. 1 (1967).

[54] *Id.* at 8.

the degree that the Fourteenth Amendment presently prohibits racial discrimination,[55] *Loving* would appear to raise a strong presumption that homosexual couples could not be uniformly denied marriage licenses after ratification of the Twenty-seventh Amendment. That presumption can only be overcome by a showing that homosexual marriage falls within the scope of a particular countervailing interest or outright exception to the Equal Rights Amendment which would not have applied to the equal protection analysis in *Loving*. Such a showing cannot be made.

It was the clear intent of Congress to forbid classifications along sex lines regardless of the countervailing government interests which might be raised to justify such classifications. The language of the Equal Rights Amendment, which speaks of an "equality" that "shall not be denied or abridged," is much less flexible than that of the Fourteenth Amendment,[56] which has been held to permit the consideration of countervailing interests.[57] Professor Emerson explained that the new Amendment

> means that differentiation on account of sex is totally precluded, regardless of whether a legislature or administrative agency may consider such a classification to be "reasonable," to be beneficial rather than "invidious," or to be justified by "compelling reasons."[58]

The legislative history supports this proposition that the new Amendment represents an unqualified prohibition—an absolute guarantee.[59]

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[55] *See, e.g.*, 118 Cong. Rec. § 4394 (daily ed. March 21, 1972) (remarks of Senator Gurney) in which the Senator maintained that passage of the Amendment was intended to compensate for the fact that the Supreme Court in Reed v. Reed, 404 U.S. 71 (1971), had failed to subject a sex classification to the strict scrutiny routinely afforded classifications based on race.

[56] Compare the language of the Equal Rights Amendment, p. 583 *supra*, with the corresponding prohibition in the Fourteenth Amendment: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

[57] *See* authorities listed in note 4 *supra*.

[58] Emerson, *In Support of the Equal Rights Amendment*, 6 Har. Civ. Rights-Civ. Lib. L. Rev. 225, 231 (1971). Professor Freund has agreed that "the proposal evidently contemplates no flexibility in construction but rather a rule of rigid equality." *Hearings*, *supra* note 51, at 72, quoted by Senator Ervin.

[59] The House Judiciary Committee Report on the proposed amendment contained an additional section proposed by Congressman Wiggins. *See* p. 586 *infra*. Fourteen members of the Committee recorded their views separately, supporting the Amendment but opposing the additional section. H.R. Rep. No. 359, 92d Cong., 2d Sess. 5 (1971). This separate statement specifically cited Professor Emerson for the view that the Amendment establishes "the fundamental proposition that sex shall not be a factor in determining the legal rights of women or of men." *Id.* at 6. The House as a whole evidently adopted this separate statement when it rejected the Wiggins addition. Furthermore, the Senate Report on that body's version of the Equal Rights Amendment

In order to forestall this construction, the House Judiciary Committee recommended the following addition to the Amendment:

> This article shall not impair the validity of any law of the United States which exempts a person from compulsory military service or any other law of the United States or of any State which reasonably promotes the health and safety of the people.[60]

The purpose of the addition was to make it clear "that Congress and the State legislatures can take differences between the sexes into account in enacting laws which reasonably promote the health and safety of the people."[61] The proposed addition was rejected in the House by a vote of 87-265.[62]

While even an absolutist interpretation would not prevent the courts from balancing the Equal Rights Amendment against other *constitutional* provisions which conflict with its commands,[63] no such considerations were raised in defense of the anti-miscegenation laws and none would appear to be relevant to homosexual marriage. In discussing the Equal Rights Amendment, the only constitutional conflict envisioned by the commentators and legislators concerned the right to privacy,[64] and it can hardly be argued that the denial of a marriage license to a same-sex couple would in any way serve the interest of the individual in being *protected* from government intrusion into his private life.

The "absolute" prohibition contained in the Equal Rights Amendment is subject to only one exception, or what Professor Emerson and his associates have termed a "subsidiary principle":[65] the Amendment "would not prohibit reasonable classifications based on [physical] characteristics that are unique to one sex."[66] This exception was designed to shield laws, such as many of those applying to pregnancy or sperm donation, which affect only one sex but which cannot realistically be

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stated that "the separate views of [the fourteen Committee members] in the House Report . . . state concisely and accurately the understanding of the Amendment . . . ." S. Rep. No. 689, 92d Cong., 2d Sess. 11 (1972).

[60] H.R. Rep. No. 92-359, 92d Cong., 1st Sess. 1 (1971).

[61] *Id.* at 2.

[62] 117 Cong. Rec. § 9390 (daily ed. October 12, 1971).

[63] *See* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 900 (1971). *But see* 118 Cong. Rec. § 4258 (daily ed. March 20, 1972), in which Senator Ervin claims that the Equal Rights Amendment is "absolute in its terms" and is therefore not subject to balancing against other constitutional provisions.

[64] *See* Brown, Emerson, Falk & Freedman, *supra* note 63, at 900; *Hearings*, *supra* note 51, at 40 (statement of Representative Griffiths).

[65] Brown, Emerson, Falk & Freedman, *supra* note 63, at 893.

[66] 118 Cong. Rec. § 4585 (daily ed. March 22, 1972) (Senate Report, quoting H.R. Rep. 92-359).

said to "discriminate" against the other.[67] It might be argued that heterosexual intercourse and procreation are activities which, because of the unique physical characteristics of men and women, may only be performed by different-sex couples, that these activities are central to the societal concept of marriage, and that the state can therefore restrict the granting of marriage licenses to different-sex couples.

This reasoning, however, would import into the Equal Rights Amendment precisely those traditional societal judgments that the Amendment was designed to circumvent. For example, a law regulating the manner in which hospitals treat pregnant persons would not ordinarily discriminate against men, because it deals directly and narrowly with a unique physical characteristic which men do not possess. However, a law which stated that persons subject to pregnancy may not enlist in the armed services would probably be considered discriminatory, because it deals not only with an objective physical characteristic but also with overbroad societal judgments about the capabilities of persons having that characteristic.[68]

In order to guard against illegitimate use of the "unique physical characteristics" principle, Professor Emerson and his associates have developed a series of factors which should be weighed by a court in determining the constitutionality of a physical characteristics classification under the Equal Rights Amendment.[69] These factors, which are not readily applicable to the peculiar circumstances presented by a ban on homosexual marriage, can be restated in terms of two more general tests: (1) are the physical characteristics upon which the classification is based truly unique to the class being regulated, and (2) is the regulation involved "closely, directly and narrowly confined to [those] unique physical characteristic[s]. . ."?[70]

A statute restricting marriage licenses to heterosexuals would fail both of these tests. While it is perfectly true that no one has the physical characteristics to accomplish either procreation or heterosexual intercourse with a member of the same sex, it is equally true that many individuals, perhaps because of age or illness, are incapable of engaging in these activities with members of the opposite sex. Nor is there

[67] *Hearings, supra* note 51, at 40 (statement of Representative Griffiths). *See also* Bayh, *The Need for the Equal Rights Amendment*, 48 NOTRE DAME LAWY, 80, 81 (1972); Brown, Emerson, Falk & Freedman, *supra* note 63, at 893.

[68] *See* Brown, Emerson, Falk & Freedman, *supra* note 63, at 894-96, in which the authors come to a similar conclusion concerning the exclusion of women from government employment because of the absenteeism which might result from their potential to become pregnant.

[69] Brown, Emerson, Falk & Freedman, *supra* note 63, at 895-96.

[70] *Id.* at 894.

the necessary close relationship between these activities and the institution of legal marriage as it is now permitted. As shown above, the ability or willingness to procreate is not a prerequisite of legal marriage in this country,[71] nor is the legality of an existing marriage in any way affected by the decision of both partners to forego heterosexual intercourse. More generally, the belief that two persons having the same primary sexual characteristics *cannot* benefit from many of the emotional, social and legal consequences of the legal status of marriage is factually untrue;[72] the belief that they *should* not so benefit is a subjective conclusion beyond the scope of the unique physical characteristics principle.

With no relevant or countervailing interests to place against the rule of "absolute" equality of treatment, the proposed Equal Rights Amendment should be interpreted as prohibiting the uniform denial of marriage licenses to same-sex couples. If such a denial were to be permitted, it would have to be on the basis of an analysis which was consistent with the strict interpretation described above, and in addition, as Professor Emerson has pointed out, in matters as important as marriage "the burden of persuasion is on those who would impose different treatment on the basis of sex."[73] In the case of laws prohibiting homosexual marriage, such a burden cannot be carried.

III. Quasi-Marital Status—an Alternative Approach

Although private consensual homosexual activity might be legalized in this country without creating many problems, as it was in Great Britain, the expansion of marriage to encompass homosexual couples would alter the nature of a fundamental institution as traditionally conceived.

The Supreme Court may in the future decide that such alteration is beyond its competence and therefore that marriage should be confined to its present definition absent a positive move on the part of individual state legislatures to broaden it.[74] If such proves to be the

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[71] *See* p. 579 and note 26 *supra*.

[72] *See* pp. 579-80 *supra*.

[73] Brown, Emerson, Falk & Freedman, *supra* note 63, at 893.

[74] This was essentially the Court's approach to polygamy in Reynolds v. United States, 98 U.S. 145, 165 (1878).

Whether that nineteenth century ruling would be affirmed today is at least open to question in light of the *Loving* decision. Mormons would appear to have a particularly strong argument against the *Reynolds* decision based on Wisconsin v. Yoder, 406 U.S. 205 (1972) (Wisconsin's attempt to force Old Amish children to attend school case, particular legal benefits available only to married couples might still be attacked on equal protection grounds under both the Fourteenth and Twenty-seventh Amendments.

If the Court granted homosexuals some of these benefits—without compelling states to grant marriage licenses—it might eventually create in effect a "quasi-marital" status. State legislatures might explicitly grant such a status, and specify the attendant rights.[75] For example, benefits such as tax advantages, wrongful death rights and intestate inheritance could be granted more easily to the homosexual couple than could inclusion within the complete maintenance-divorce-alimony complex of laws involving substantial state regulation. An analogy can be drawn to the line of Supreme Court decisions which has given illegitimate children certain rights, albeit a less-than-equal status in comparison to their legitimate siblings.[76]

IV. Conclusion

In the final analysis, the Court should not avoid granting full relief from discriminatory legislation simply because that legislation is based on deeply held beliefs. A quasi-marital status might satisfy many of the interests of homosexuals in gaining marriage licenses, but it would inevitably fall short of fully normalizing their relationships. A legislative stigma of deviance would remain. The stringent requirements of the proposed Equal Rights Amendment argue strongly for removal of this stigma by granting marriage licenses to homosexual couples who satisfy reasonable and non-discriminatory qualifications.

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through age sixteen held an unconstitutional infringement on freedom of religion), as noted by Justice Douglas in dissent, *id.* at 247. *See generally* H. Foster, *Marriage: A "Basic Civil Right of Man,"* 37 Fordham L. Rev. 51 (1968).

[75] The possibility of such a legislatively created quasi-marital status for homosexuals was suggested in J. Goldstein & J. Katz, The Family and the Law 9 n.1 (1965).

[76] Labine v. Vincent, 401 U.S. 532 (1971); Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

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A LEGAL ANALYSIS OF THE POTENTIAL IMPACT OF THE PROPOSED EQUAL RIGHTS AMENDMENT (ERA) ON HOMOSEXUALS

Karen J. Lewis
Legislative Attorney
American Law Division
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A LEGAL ANALYSIS OF THE POTENTIAL IMPACT OF THE PROPOSED EQUAL RIGHTS AMENDMENT (ERA) ON HOMOSEXUALS

INTRODUCTION

Amidst the ongoing debate surrounding the proposed Equal Rights Amendment (ERA), considerable interest has focused on laws restricting homosexuals, such as those barring homosexual marriages, and how they would be affected by the ERA. Both proponents and opponents of the ERA have expressed differing views regarding this issue. In fact, even among proponents there are diverse opinions. Those who believe that restrictive homosexual statutes would not be affected argue that the ERA pertains to sex discrimination, not to sexual preference. There are others who have argued that the ERA will require the granting of marriage licenses to homosexual couples.

In considering the issue of the possible impact of the proposed ERA on homosexuals, one must understand the nature of the arguments and concerns advanced. The purpose of this report is to analyze the status of homosexuals in the context of the proposed ERA. At the very outset, we will describe the arguments that have been made. After this discussion, there will follow an examination of the legislative history of the earlier 1972 proposed constitutional amendment and contemporaneous court decisions. In this regard, however, the earlier legislative record for the 1972 version can only be instructive and not controlling since the actions of one Congress do not bind a future Congress.

Court decisions regarding protectable interests of homosexuals under Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. 2000e et seq., will also be discussed. Title VII prohibits employment discrimination based upon sex, race, color, religion, and national origin. While not controlling in the ERA context, these Title VII cases provide some insight into how courts have interpreted sex discrimination and the protectable interests of homosexuals in a related statutory context.

EXECUTIVE SUMMARY

During the ongoing debate surrounding the proposed Equal Rights Amendment (ERA), considerable interest has focused on laws restricting homosexuals, such as those barring homosexual marriages, and how they would be affected by the ERA. This report describes the varying opinions that have been expressed regarding this issue. For example, on the one hand, some people have argued that the ERA will have no impact because discrimination on the basis of sexual preference is different from discrimination based on sex. While on the other hand, there are people who have contended that there would be an impact because the ERA incorporates an "absolute" standard of sex discrimination, discrimination against homosexuals is sex-based, and no distinctions based on sex are constitutionally permissible.

After discussing the conflicting arguments on the question of whether the proposed ERA will affect laws restricting homosexuals, this report goes on to examine the legislative history of the earlier 1972 proposed constitutional amendment and contemporaneous court decisions. This earlier legislative record is only instructive and not controlling since the action of one Congress cannot bind future Congresses.

This report also describes relevant state court rulings in states with state ERA's where the question of the impact of the state ERA on laws restricting homosexuals has arisen. In addition, case law involving homosexuals' protectable interests under Title VII of the 1964 Civil Rights Act, as amended, is analyzed.

This paper concludes that, in the final analysis, the impact of the currently proposed ERA will be determined by the legislative history that is established by the Congress considering it as well as by contemporaneous court decisions. The legislative record developed for the earlier 1972 proposal, state court decisions involving state ERA's and homosexuals, and the body of case law that has evolved under Title VII can provide guidance.

DISCUSSION OF VARIOUS VIEWS CONCERNING THE THE POTENTIAL IMPACT OF THE ERA ON HOMOSEXUALS

A. Views Of Those Believing The ERA Will Not Affect Homosexuals

ERA proponents are not necessarily united in their opinions regarding the potential impact of the proposed ERA on homosexuals. Some proponents argue that the ERA would not necessarily affect homosexuals because the proposal applies to sex-based discrimination, not to sexual preference. They also contend that heterosexual marriage will prevail. These proponents argue that heterosexual marriage will be included in a broad "physical differences" exception to the amendment.[1/] They further suggest this exception will permit regulation of such sex related activities as donation of sperm, wet nurses, and maternity leaves.[2/] The principle of the ERA, they contend, "does not preclude legislation which regulates, takes into account, or otherwise deals with a physical characteristic unique to one sex."[3/]

In 1973, one scholar pointed out that while it could conceivably be argued that language of the proposed ERA would require same sex marriage, this result would be unlikely given the legislative history and the concept of equality prevalent in existing court decisions. He wrote specifically that:

[1/] Eastwood, "The Double Standard of Justice: Women's Rights Under the Constitution," 5 Val. L. Rev. 281, 313 (1971). *See* S. Rep. No. 92-689, 92d Cong., 2d Sess. 12 (1972); H.R. Rep. No. 92-359, 92d Cong. 1st Sess. 7 (1971); Murray and Eastwood, "Jane Crow and the Law: Sex Discrimination and Title VII," 34 Geo. Wash. L. Rev. 232, 239 (1965); Brown, Emerson, Falk and Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women", 80 Yale L.J. 871, 893 (1971) (hereinafter Brown, Emerson, Falk and Freedman).

[2/] S. Rep. No. 92-689 92d Cong., 2d Sess. 12 (1972); H.R. Rep. No. 92-359, 92d Cong., 1st Sess. 7 (1971). *See also* Bayh, "The Need for the Equal Rights Amendment," 48 Notre Dame Lawyer 80, 81 (1971); Brown, Emerson, Falk and Freedman, *supra* at 893.

[3/] Brown, Emerson, Falk and Freedman, *supra*, at 893.

When the principles of family and procreation are merged with heterosexual intercourse, the physical characteristics exception would likely apply. Only a paired male and female can have heterosexual intercourse. Because of the unique physical characteristics of each, the classification would not violate the principle that the attributes of individuals be the basis of the classification. However, interpreting the amendment in this manner would grossly violate the words of the amendment itself. There can be no more literal example of denying rights "on account of sex" than denying marriage to same sex couples because of the genitals of the applicants.

Will the courts nevertheless define a "physical differences" exception to the Equal Rights Amendment which will embrace same sex marriage? They likely will for two reasons.

First, no matter how much equality the amendment demands, males and females are physically different. *Equality does not mean sameness*. As Justice Frankfurter once observed, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Only heterosexual couples can have heterosexual intercourse and procreate, and the amendment should not prohibit legislation based on that existing distinction*.

Secondly, it was not the intent of Congress to compel recognition of same sex marriage. This possibility was raised during both the congressional hearings and debates on the amendment, and its proponents denied that the amendment would have such an effect. Wording to make this interpretation explicit was not considered feasible. One recommended addition to the amendment, to allow laws "which reasonably [promote] the health and safety of the people," would perhaps include marriage restrictions, but might also allow restrictions, such as maximum hour laws for women, considered discriminatory. An addition explicitly excepting "physical differences" could easily have the same effect, negating the very principle of the Equal Rights Amendment. An addition specifically excepting marriage statutes from the application of the amendment would be too restrictive, and entirely inappropriate for a constitutional amendment.

Thus, even though the wording of the amendment lends merit to the argument that it would compel recognition of same sex marriage, courts are not likely to so interpret the amendment because of the actual physical differences of the sexes and because of the intent of Congress.

Sullivan, "Same Sex Marriage and the Constitution", 6 Legal Problems in Family Law, 275, 292-293 (1973). (Footnote citations omitted). (Emphasis supplied).

B. Views Of Those Believing The ERA Will Affect Homosexuals

In a 1973 NOTE in the Yale Law Journal, the two authors maintained that the ERA would have implications for homosexual marriages. They looked at the wording of the 1972 proposal and interpreted the legislative intent to mean that an absolute standard of review applied. Therefore, no classification based upon sex could survive judicial review in their minds. They wrote:

> The Court's decision that the denial of marriage licenses to homosexuals does not abridge existing equal protection law would not save that practice from attack under the proposed Twenty-Seventh Amendment...The legislative history of the Amendment clearly supports the interpretation that sex is to be an impermissible legal classification, that rights are not to be abridged on the basis of sex. A statute or administrative policy which permits a man to marry a woman, subject to certain regulatory restrictions, but categorically denies him the right to marry another man clearly entails a classification along sexual lines....
>
> ...The legislative history supports this proposition that the new Amendment represents an unqualified prohibition--an absolute guarantee...
>
> With no relevant or countervailing interests to place against the rule of "absolute" equality of treatment the proposed Equal Rights Amendment should be interpreted as prohibiting the uniform denial of marriage licenses to same-sex couples....
>
> ...The stringent requirements of the proposed Equal Rights Amendment argue strongly for removal of this stigma by granting marriage licenses to homosexual couples who satisfy reasonable and non-discriminatory qualifications. Perkins and Silverstein, "The Legality of Homosexual Marriage," NOTE, 82 Yale L.J., at 583, 585, 589 (1973). (Emphasis supplied).

The foregoing position appears to be based on the idea that because the proposed ERA prohibits sex-based classifications, it would prohibit differential treatment with respect to homosexuals as well, unless, for example, the classification applied equally to members of each sex respectively. This theory would argue that in order to pass judicial scrutiny under the ERA, same sex marriages allowed betwuen men would also have to be permitted between women.

Two prominent law professors testified before the Senate Judiciary Committee in 1972 emphasizing that the absolute wording of the amendment would in fact compel recognition of the same sex marriage. These include Professors Paul Freund of Harvard and James White of Michigan.[4/]

In a speech delivered by Rita Hauser, the U.S. Representative to the United Nations Human Rights Commission, at the American Bar Association Annual Meeting in August, 1970, Ms. Hauser remarked:

> I also believe that the proposed Amendment, if adopted, would void the legal requirement or practice of the states' limiting marriage, which is a legal right, to partners of different sexes. This requirement stems from the traditional view that the promise or purpose of marriage, in law, is the reproduction of the species. Some would surely argue that such a view is no longer acceptable in a world where over-population seems to be the major social dilemma, rather than the contrary, and the the legal premise of marriage should be the happiness or well-being of the partners. I wish to make very clear that I do not share this view, which has been put forth in respectable legal circles, as I believe social policy would not be served by marriage between people of the same sex. In the absence of a clear indication of legislative intent, however, it appears that the proposed Amendment might lead to just this result for it would prevent denial of equality of rights on a basis of sex.
>
> Hauser, "The Equal Rights Amendment," 1 Hum. Rights 54, 62 (1971). (Emphasis supplied).

In summary, there are diverse views concerning whether the proposed ERA would affect laws restricting homosexuals, e.g. those barring homosexual marriages. Those contending that there probably would be no impact

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[4/] See S. Rep. No. 92-689, 92d Cong., 2d Sess. 47 (1972); and Hauser, "The Equal Rights Amendment, "1 Hum. Rights 54, 62 (1971). See also, Freund, "The Equal Rights Amendment is Not the Way," 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 234, 238 (1971).

base their position primarily on the ground that the ERA prohibits classifications based on sex discrimination and has no application to sexual preference as is involved in same sex marriages. These individuals also believe that the "unique physical characteristic" exemption to the ERA would effectively exclude homosexual marriages from the purview of the amendment. Others argue that the ERA would affect homosexuals because inherent in the amendment is an absolute standard, i.e. prohibiting all classifications based on gender. This group would say that the ERA would require that men be allowed to marry men and women to marry women.

DISCUSSION OF MEANING OF CURRENT ERA PROPOSAL

The proposed ERA, as reintroduced in H.J. Res. 1 and S.J. Res. 10, provides that--

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.

This wording of the amendment is identical to that passed by the 92nd Congress in 1972. In 1971, in response to objections from Senator Ervin and several constitutional lawyers, the wording of the enforcement language contained in the second section (which had read since 1943: "Congress and the several States shall have power within their respective jurisdictions, to enforce this article by appropriate legislation") was changed to conform to the enforcement language of most of the other twenty-six constitutional amendments now in effect.

The ongoing debate concerning the proposal has tended to center on the meaning of this language. The answer depends, of course, to a great extent upon the legislative history the 98th Congress develops through the course of the hearings held, reports issued, and floor debates. An extensive legislative records exists with respect to the 92nd Congress proposal, H.J. Res. 208; however, that history is only instructive and not controlling with respect to the current measure because the actions of one Congress do not bind a future Congress. Therefore, it is up to the 98th Congress to develop its own legislative history for H.J. Res. 1 and S.J. Res. 10.

In addition to looking to the legislative history to determine what the proposed ERA means, one can also look to contemporaneous court decisions, the rationales used, and the standard of review applied to sex-based classifications under the equal protection clause of the Fourteenth Amendment.

Earlier Congresses have found little disagreement with the general intent of the proposed amendment. A Senate Judiciary Committee report in 1972 (S. Rep. No. 92-689, 92d Congress, 2d Sess.) interpreted the statement "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex" to mean that sex should not be a factor in determining the legal rights of men and women; that the amendment would affect only governmental action, with the private actions and private relationships of men and women left unaffected unless these rise to the level of state action; and that the only requirement of the Amendment was equal treatment of individuals.

The proposed Amendment also gives Congress power to enforce these provisions (the States already possess such authority under their general police power) and provides that the Amendment shall take effect two years after the date of ratification, i.e. after three-fourths or 38 states have approved the proposal. The two year period is provided presumably to give state legislatures and the Congress time to amend their laws to bring them into conformity with the intent of the proposed ERA.

The effect of the ERA, according to the 1972 Senate Report, would be to require that government at all levels, federal, state and local, treat men and women equally as citizens and individuals under the law. It would eliminate from the law sex-based classifications that specifically deny equality of rights or violate the principle of nondiscrimination with regard to sex. Thus, federal or state laws or official practices that now make a discriminatory distinction between women and men would presumably be invalid under the ERA. In addition, certain responsibilities and protections which once were, or are now, extended by the states or federal government only to members of one sex would have to be either extended to both sexes or eliminated entirely.

While the equal protection language in the Fourteenth Amendment is not identical to the "equality of rights" language in the proposed ERA, the Supreme Court's Fourteenth Amendment decisions thus far in the gender-based discrimination context are instructive in terms of the standard of review used by the Court to determine the validity of legislative classifications. Of course, Congress can express in the legislative history whatever standard it intends the Court to apply under the ERA, especially if it wants a more stringent level of review than that which is currently applied to sex-based classifications under the equal protection clause. There are basically three standards of equal protection review: traditional, rational basis; intermediate (one less deferential than the rational basis test and one less restrictive than the strict scrutiny test); suspect class-fundamental interest or strict scrutiny test. The intermediate standard has been used by the Supreme Court to evaluate sex classifications. Therefore, the sex distinction must, in order to withstand constitutional challenge, "serve important governmental objectives and must be substantially related to achievement of those objectives," Craig v. Boren, 429 U.S. 190, 197; Mississippi University for Women v. Hogan, 100 S. Ct. 3331, 3337 (1982).

The impact, if any, of the proposed ERA on homosexuals may depend to a large extent on the legislative history developed by the Congress proposing it and by the standard of review the Court chooses to apply to sex-based classifications.

As indicated earlier, the legislative history of the earlier proposed ERA, i.e. the 1972 version, can only be instructive and not controlling. Senator

Birch Bayh, the amendment's chief sponsor in the Senate, remarked in 1972 that prohibition against same sex marriages would be permissible if licenses were denied equally to both male and female pairs. 118 *Cong. Rec*. 9331 (1972).[5/]

Senator Bayh's conclusion is criticized in NOTE, "The Legality of Homosexual Marriage," 82 Yale L.J. 573, 584 (1973). Authors of this NOTE contend that the legislative history of the 1972 version of the ERA supports the interpretation that sex is to be an impermissible legal classification, and that rights are not to be abridged on the basis of sex. With such an absolute standard, these authors argue that same sex marriages would have to be allowed. They cite comments on the floor by Senator Sam Ervin to support their interpretation. For example, Senator Ervin remarked:

> Now, Mr. President, the idea that this law would legalize sexual activities between persons of the same sex or the marriage of persons of the same sex did not originate with me. I do not know what affect the amendment will have on laws which make homosexuality a crime or on laws which restrict the right of a man to marry another man or the right of a woman to marry a woman or which restricts the right of a woman to marry a man. But there are some very knowledgeable persons in the field of constitutional law...who take the position if the equal rights amendment becomes a law, it will invalidate laws prohibiting homosexuality and laws which permit marriages between men and women.
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> 118 *Cong*. *Rec*. 9315 (1972)
> (remarks of Senator Ervin). [6/]

[5/] *See also* S. Rep. No. 92-689, 92d Cong., 2d Sess. 47 (1972); 118 *Cong. Rec*. 9523, 9536 (1972).

[6/] *See also* Senator Ervin's comments quoting Professor Paul Freund's statement in hearings before the Senate Judiciary Committee, 118 *Cong. Rec*. 9315 (1972):

(continued)

Professor Paul Freund took issue with Senator Bayh's position and argued that his reasoning was inconsistent with the Supreme Court's rulings concerning the anti-miscegenation statutes under the Fourteenth Amendment.[7] The Court held in Loving v. Virginia, 338 U.S. 1 (1967), that a marriage license cannot be denied merely because applicants are of different races. This denial was regarded by the Supreme Court to be an unlawful racial classification, despite the fact that it affected the races equally. 388 U.S. 1, at 8 (1967).

The authors of a 1973 Yale Law Journal NOTE, developed this example of race discrimination in Loving and tried to draw an analogy to sex discrimination in the marriage context. They wrote specifically:

> In light of the frequently asserted claim that the Equal Rights Amendment was designed to prohibit sex discrimination to at least the degree that the Fourteenth Amendment presently prohibits racial discrimination, Loving would appear to raise a strong presumption that homosexual couples could not be uniformly denied marriage licenses after ratification of the Twenty-seventh Amendment. That presumption can only be overcome by a showing that homosexual marriage falls within the scope of a particular countervailing interest or outright exception to the Equal Rights Amendment which would not have applied to the equal protection analysis in Loving. Such a show-cannot be made.
>
> It was the clear intent of Congress to forbid classifications along sex lines regardless of the countervailing government interests which might be raised to justify such classifications.
>
> NOTE, 82 Yale L.J. 573, at 584-585 (1973).

(continued) ... if the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation. Whether the proponents of the amendment shrink from these implications is not clear.

[7] 118 Cong. Rec. 9315 (1972).

The author of an article for the University of California, Davis, Law Review argued to the contrary. He looked at the legislative history of the 1972 proposed ERA and concluded that the Congress did not intend to compel recognition of same sex marriages. See 6 University of California, Davis, L.R. 275, at 292-293 (1973).

The Loving v. Virginia situation could perhaps also be distinguished on another ground. The anti-miscegenation laws were premised on black inferiority, i.e. marriage licenses were denied to applicants of different races because the white and black races were not considered to be equal in stature. In the context of treatment of the sexes, statutes barring marriage between homosexuals do not appear to be predicated upon any preconceived notion of inferiority. Rather, the prohibition of same-sex marriages seems to derive from the adherence to tradition, i.e. society's long accepted practice of heterosexual marriages.

Furthermore, the Supreme Court has already held that the right to marry is a fundamental right protected by the due process clause. Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640 (1974); Zablocki v. Redhail, 434 U.S. 374, 383-387 (1978). In Zablocki v. Redhail, supra, the majority of the Court invalidated a state statute that denied the right to marry to someone under an obligation to support minor children when he failed to meet that obligation. The Court's holding in Redhail was based on the ground that the law in question did not serve any legitimate interest which the State could assert to be compelling enough to justify it. Under this strict standard, courts to date have not struck down statutes barring homosexual marriages. Thus, unless a more heightened standard of review is utilized by the courts under the ERA, it would seem that laws restricting homosexuals, such as the marriage laws, would be unaffected by the ERA.[8]

There has been at least one state court decision interpreting a state ERA as not requiring same sex marriages. Singer v. Hara, 11 Wash. App. 247, 522 P. 2d 1187 (1974). The equal rights provision in the State of Washington's Constitution provides: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." In Singer an application for a marriage license was denied to two people of the same sex, pursuant to a state law prohibiting same-sex marriages. The state court of appeals held that the law was not violative of the state equal rights amendment because: (1) all same-sex marriages, both male and female, were prohibited; (2) no sex-based classification was involved since the denial was based on the "recognized definition" of marriage as between two persons of the opposite sex (522 P.2d at 1192); and (3) the state ERA protected only those persons who were able to show that they had been denied an existing right or responsibility solely on the basis of sex. The court found that the state ERA did not create any new

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8/ Recently a body of case law approving homosexual behavior has been developing. See People v. Onofre, 51 NY2d 476, 415 NE2d 936, 434 NYS2d 947 (1980) (consensual sodomy may not be deemed criminal); People v. Uplinger, 58 NY2d 936 (1983) (Since conduct ultimately contemplated by anti-loitering statute, consensual sodomy, may not be regarded as criminal, then the State has no basis upon which to continue punishing loitering for that purpose).

A petition for certiorari was granted by the U.S. Supreme Court on Oct. 3, 1983 in the Uplinger case. N.Y. v. Uplinger, No. 82-1724. The case presents two questions: (1) whether the New York anti-loitering statute (barring loitering for the purpose of engaging in deviate sexual intercourse) is a valid exercise of the state's power to control order; and (2) whether this provision in the N.Y. Penal Law violates any rights protected by the U.S. Constitution.

rights, e.g. same-sex marriages, which had previously been prohibited; rather, it guaranteed that existing and future rights would be equally available to all persons regardless of sex.

The holding or rationale in the Singer v. Hara case may be persuasive but is not determinative with respect to how the Supreme Court might in the future interpret and apply the federal ERA to homosexuals.

Similarly, a body of case law has developed under Title VII of the 1964 Civil Rights Act, as amended, which also adheres to the principle that there is a difference between discrimination based on sex and sexual preference, the former being a basis for Title VII coverage, while the latter is not.

DISCUSSION OF DISCRIMINATION AGAINST HOMOSEXUALS IN THE EMPLOYMENT CONTEXT UNDER TITLE VII

Title VII of the 1964 Civil Rights Act, as amended, contains broad language that makes unlawful any employment practice by an employer, labor organization, or employment agency that discriminates against any individual because of race, color, religion, sex, or national origin. 42 U.S.C. 2000e *et seq*. The courts and the Equal Employment Opportunity Commission (EEOC) have uniformly rejected the contention that consideration of sexual preference in connection with application for employment constitutes unlawful sex-based discrimination under Title VII. *Smith* v. *Liberty Mutual Insurance Co.*, 395 F. Supp. 1098 (N.D. Ga. 1975), aff'd. 596 F.2d 325 (5th Cir. 1978); *DeSantis* v. *Pacific Telephone and Telegraph Co.*, 608 F.2d 327 (9th Cir. 1979). Nor is discrimination against homosexuals in federal sector employment prohibited by any other statute or executive order. In fact, the exclusive avenue of redress for individuals denied federal jobs not covered by the civil service rules and regulations may be a court action to enforce their claims under the Fifth Amendment.

An examination of Title VII's legislative history sheds little light on whether Congress intended the law to protect homosexuals. In fact, there is no reference to sexual preference protection in any of the floor debates. *See* 110 *Cong. Rec*. 2577 (1964).[9] Thus, there is no evidence that Congress even considered whether the inclusion of sex as a protected category under Title VII was to encompass sexual preference as well.

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[9] *See also*, Miller, "Sex Discrimination and Title VII of the Civil Rights Act of 1964," 51 Minn. L. Rev. 877, 880-82 (1967). The amendment adding sex as a proscribed classification was offered on the floor of the House one day before final passage by the House of the entire bill. It was introduced by Congressman Howard Smith of Virginia, a staunch opponent of the 1964 Civil Rights measure. This factor has led to the conclusion that sex was added as a last minute effort to defeat the bill. *See* 20 Hastings L.J. 305, 311 (1968); 84 Harv. L. Rev. 1109, 1167 (1971).

CONCLUSION

As the foregoing highlights, there is a difference of opinion concerning whether the proposed ERA will affect discrimination against homosexuals. Some argue that the ERA will have no impact because discrimination on the basis of sexual preference is different from discrimination based on sex. Under this theory, as long as all homosexuals are treated alike, regardless of whether they are male or female, there is no gender-based discrimination. Thus, homosexual marriages could conceivably be forbidden because heterosexual marriages serve the state interest in procreation, family relationships and the like. It has been argued also that the "physical uniqueness" exception to the ERA encompasses homosexuals and thus allows heterosexual marriages and prohibits same sex marriages.

Contrary views have been advanced. For example, there are those who contend that the ERA incoporates an "absolute" standard of sex discrimination, i.e. no distinctions based on sex are constitutionally permissible. This view conceives of discrimination against homosexuals as sex-based discrimination so that the ERA would void all bans on homosexual marriages.

In referring to the 1972 proposed ERA, authors of a legal textbook on gender discrimination have written:

> The effect that the Equal Rights Amendment will have on discrimination against homosexuals is not yet clear. The legislative history suggests that it was not the intent of Congress to prohibit such discrimination. On the other hand, it is hard to justify a distinction between discrimination on the basis of the sex of one's sexual partners and other sex-based discrimination.
>
> Babcock, Freedman, Norton and Ross,
> Sex Discrimination and the Law, 180
> (1975). (Footnote citations omitted).

The impact of the currently proposed ERA on homosexuals will be determined by the legislative history that is established by the Congress considering it as well as by contemporaneous court decisions. The extensive legislative record established for the 1972 proposal can be referred to for guidance, but it is in no way controlling since the action of one Congress cannot bind future Congresses. Similarly, any state court rulings in states with state ERA's can be instructive in terms of the holdings and rationales, e.g., the Singer v. Hara case, supra, decided by the State of Washington appeals court stating that the ban on homosexual marriages was not violative of the state ERA.

Another place to look for guidance concerning how courts have interpreted sex discrimination and discrimination against homosexuals is the body of case law that has evolved under Title VII of the 1964 Civil Rights Act. Title VII, unlike the proposed ERA is a statutory rather than a constitutional proscription against sex discrimination. Also, Title VII only applies in the employment context. Nevertheless, the courts interpreting Title VII have uniformly held that it does not protect homosexuals against discriminatory treatment. In examining the legislative history of the law, the courts have found no evidence that Congress ever intended the ban on sex discrimination to include a ban against discrimination against homosexuals. In short, sexual preference and sex discrimination are different according to courts interpreting Title VII.

The most that can be said in conclusion is that the nature of the impact of the proposed ERA on laws restricting homosexuals, if any, will depend on the completed legislative history that evolves and the contemporaneous court decisions.

Karen Lewis

Karen J. Lewis
Legislative Attorney
American Law Division
October 12, 1983

- Yale
- Singer

[From the New York Times, Dec. 10, 1982]

PARTNERSHIP LAW VETOED ON COAST

(By Wallace Turner)

SAN FRANCISCO, Dec. 9.—Mayor Dianne Feinstein today vetoed a San Francisco city ordinance that would have extended to live-in lovers, including homosexuals, the health insurance benefits that now go to husbands and wives of city employees.

The San Francisco Roman Catholic Archdiocese issued a statement praising the veto as "a courageous act" in protection of family life, but Mayor Feinstein explained her veto in different terms.

"I go out all over the world and defend this city," said the Mayor, whose election in 1979 was achieved with heavy support of the homosexual population, which has been estimated to be 15 percent. "I must believe in what I am defending. I would love to go out and defend a document for the changing life styles we have in our city. This is not that document."

Mayor Feinstein said she found the ordinance to be riddled with "ambiguity, vagueness and unclarity." But she said she hoped that discussion with other city officials would produce a substitute to accomplish the same purpose in a way she could accept.

HOMOSEXUAL PROPOSED LAW

The ordinance she vetoed was introduced by Harry Britt, the only publicly homosexual member of the Board of Supervisors. Mr. Britt was traveling in the East today, but his office released a statement in which he said that "by vetoing this law, Mayor Feinstein has shown it is our nation's institutions that lack civility. She has done serious harm to the efforts of gay men and lesbians to gain acceptance and understanding of our life styles."

Dana van Gorder, a member of Mr. Britt's staff, said the Mayor "does not believe in the spirit of this legislation whatsoever." The spokesman said that the homosexual community "has had a sense for some time that she has viewed us with a certain moral judgment."

At dusk about 200 people, many identifying themselves as homosexuals, gathered at the City Hall steps in response to a call for a protest. They cheered speakers who criticized Mayor Feinstein, and they chanted "Dump Dianne."

Roman Catholic Archbishop John R. Quinn had urged the Mayor to veto the measure, which was passed on an 8-to-3 vote last month. In a letter to the Mayor, which his office released Tuesday, Archbishop Quinn argued that "to reduce the sacred covenant of marriage and family by inference or analogy to a 'domestic partnership' is offensive to reasonable persons and injurious to our legal, cultural, moral and societal heritage."

The ordinance provided for a system of registering domestic partnership involving unmarried couples and a means to dissolve them, and it set fees for both services. It would have cost $23 to register a couple and $5 to terminate the relationship's legal standing.

OVERRIDE PROSPECTS UNCLEAR

Had Mayor Feinstein not vetoed the ordinance, it would have become law without her signature on Friday. The original margin of passage would be enough to override her veto. However, Supervisor Louise Renne, who voted for the ordinance, is a longtime supporter of Mayor Feinstein, who appointed her to the board. A member of her staff said that Mrs. Renne, who was not available for comment, had not announced a position.

Mayor Feinstein has made it plain, without a formal announcement, that she intends to campaign for a second term next year. No formidable opposition has surfaced thus far. In 1979, when she defeated Supervisor Quentin Kopp, who voted against the "domestic partner" ordinance, Mrs. Feinstein won precincts in areas where many homosexuals live.

It was Mayor Feinstein who appointed Mr. Britt to the Board of Supervisors. He filled the seat vacated by the murder in 1977 of Supervisor Harvey Milk, the first declared homosexual elected to public office here. Mrs. Feinstein, who had been president of the Board of Supervisors, had been chosen by the board to fill the term of Mayor George Moscone, who was killed in the same shooting incident at City Hall.

[From the New York Times, Sept. 5, 1984]

Homosexual Weddings Stir Dispute

(By Edward A. Gargan)

Syracuse, Aug. 30—For nearly a year, the two dozen parishioners of the Ray of Hope Metropolitan Community Church worshiped in undisturbed tranquility on Sunday.

But that solitude was shattered after the Metropolitan Community Church conducted several marriages for homosexual couples. Rectors of two Episcopalian churches have taken up theological cudgels against each other, and the Bishop of the Episcopal Diocese of Central New York has been forced to intervene.

Too tiny to have its own building, the nondenominational church, which reaches primarily into Syracuse's homosexual community for parishioners, has held services since last October at the 108-year-old, gray, stone Grace Episcopal Church. The Metropolitan parishioners, who worship on Sundays after the regular Episcopal services, have the blessing of Grace's rector, the Rev. Judith Upham.

OPPORTUNITY FOR COMMITMENT

"Metropolitan Community Church is offering an alternative to the bar scene," said Miss Upham, who describes Grace Church's parishioners as largely middle class. "It is offering an opportunity for fidelity and commitment."

"There's quite a large gay community in Syracuse," said Ted Ewald, who founded the church last year. "We put signs up in gay bars, and people responded." Nonetheless, he said, the church was formed quietly because of fear of harassment and vandalism.

"It's a lot more difficult to be gay in Syracuse," he said. The region is very reserved and very conservative."

Even so, the church thrived with its small but regular group of parishioners. In July, two parishioners participated in a marriage, which a local newspaper reporter attended.

CEREMONY CAUSES DISPUTE

The service was conducted by a minister "from a mainstream church," said Michael Royce, a member of the Metropolitan congregation. He declined to identify the minister or the denomination.

The next day, the headline in a local paper, The Herald-Journal, said, "Two Men Married in Gay Church."

Several days later, the Rev. Robert F. Haskell, the rector of St. Andrew's Episcopal Church across town, sent a letter to Miss Upham. He sent copies to the newspaper and to the local Bishop, the Right Rev. O'Kelley Whitaker. The letter read in part:

"The organization which you permit to use your church advocates homosexual conduct as an alternative life style, and its members admit that they actively engage in homosexual behavior without acknowledgment that such conduct is against the word of Holy Scripture. The Scriptures clearly teach that to practice homosexual relations is a sin.

"We are especially concerned that you are permitting the sanctuary of an Episcopalian Church to be used to perform 'marriages' of homosexual persons. Marriage is a most holy sacrament of the church involving a man and a woman. a homosexual 'marriage' is both immoral by the standard of Scripture, and illegal under both canon and civil law.

"We urge that you put an end to the meetings of this organization in your church and that you make a clear public statement repudiating this conduct."

HUNT AND PECK THEOLOGY

Miss Upham said she was surprised at the tone of the letter.

"Clearly, it's an issue of different theologies," she said. "Scripture is certainly the major basis for making decisions. Then comes the question of how you read Scripture, whether you take it as a whole or you pick it apart. I don't know any respectable theologian that does hunt and peck theology, what we call proof-texting.

"It's also important to look at science. If, in fact, people are born homosexuals, then we should say if God created people that way, then we should let them be homosexuals."

Into the theological fray stepped Bishop Whitaker, who issued a statement that was read at some Episcopal churches.

"I see the action of Grace Church," the Bishop's statement read, "as an effort to provide space for a ministry to homosexual persons, a ministry which the Episcopal Church, by and large, is not seeking to offer itself."

NOT A "MARRIAGE"

Then, Bishop Whitaker addressed two specific issues raised by Father Haskell's letter.

"From our perspective, there is no such thing as a 'homosexual marriage.' " But, he added, "it is my understanding that the Metropolitan Community Church does not actually speak of 'marriages' between homosexual persons of the same gender but rather of 'unions.' " Thus, he wrote, it was "technically incorrect" to characterize the ceremony as a marriage.

As to the broader issue of Scriptural sanctions of homosexuality, Bishop Whitaker cautioned against selective readings of the Bible.

"From time to time, isolated verses of the Bible are used by Christians to justify condemnation of homosexual activity and ostracism of homosexual persons," he wrote. "such use of scripture is very dangerous. If one person is going to justify a position, another person is equally entitled to do the same for quite different positions."

GREATER DIALOG

Mr. Royce said he was heartened by the Bishop's statement.

"In the New Testament, Jesus never once mentioned homosexuality," he said. "We don't consider homosexuality a sin. Remember, Christ was a man who taught love and lived with the outcasts, the thieves, the prostitutes. The mainstream churches have pushed us, the outcasts out. They have the basic belief that we are not allowed to worship because we are sinners."

Mr. Ewald, the Metropolitan founder, said he hoped the religious contretemps would lead to greater dialogue among churches. "Some churches are slowly beginning to reanalyze their stand on homosexuality," he said. "I think it's going to lead to more discussions."

Both Father Haskell and Bishop Whitaker declined to discuss the dispute.

Meanwhile, Miss Upham said she intended to keep Grace Episcopal Church open to the Metropolitan parishioners.

"We need a place where virtues like fidelity and commitment are promoted," she said. "I think what we're doing is Christian. I think what we're doing is providing a place for people who have nowhere else to go."

The State Equal Rights Amendments and Their Impact on Domestic Relations Law

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PAUL M. KURTZ*

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III. Substantive Issues

A. *Homosexual Marriage*

In the context of equal rights amendments a question often discussed but not often litigated is the possible effect on the legitimacy of marriage between members of the same sex. One of the more emotional issues raised in connection with the ratification of state ERAs is whether enactment of the amendment will automatically authorize marriage between homosexuals.

On its surface, the question of same-sex marriages seems outside the realm of sex discrimination problems. Presumably the state would argue that the discrimination is not between males and females, but rather between heterosexuals and homosexuals. Regardless of the success or failure of a challenge to such a classification under the Fourteenth Amendment's Equal Protection Clause, the argument would continue, because both men and women might be either homosexual or heterosexual the classification is not being based on sex discriminations. Therefore the ERA is simply not relevant to the issue.

The problem, however, is not so easily resolved. The state which forbids two homosexual males, A and B, to marry is certainly discriminating against A on the basis of his sex. Clearly, if he were a female (and possessed all other prerequisites for marriage), he would be permitted to marry B. The question is whether this discrimination can survive enactment of an equal rights amendment.

Only one court to date has considered same-sex marriages under a state ERA. The Court of Appeals of Washington, in *Singer v. Hara*,[46] affirmed the lower court's denial of a motion to compel an administrative official to grant two homosexual males a marriage license. The appellants argued that the denial of the license violated the state marriage laws and, in the alternative, that if the marriage laws permitted such a denial of the license, they were unconstitutional under the state's equal rights amendment.

The court summarily dismissed the statutory argument by pointing to other sections within the marriage law which referred to "male," and "female." As to the ERA issue, the state asserted that since all homosexual marriages were barred by statute there was no sex discrimination issue. Male pairs as well as female pairs were denied a license under the law.

The court upheld the state's denial of the license by asserting that marriage has traditionally been conceived of as a relationship between a man and a woman. Therefore, wrote the court, "appellants are not being denied entry into the marriage relationship because of their sex; rather they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex."[47] Quoting a Kentucky decision[48] which dealt with homosexual marriage in a federal constitutional challenge, the court wrote that "what they propose is not a marriage."

The *Singer* appellants had argued that the Supreme Court of the United States, in *Loving v. Virginia*,[49] had rejected an analogous state argument. In *Loving*, Virginia had defined marriage as being a relationship between two members of the same race. The Court there held that this definition of the institution violated the Fourteenth Amendment. The appellants here argued that Washington's definition of marriage as including one member of each sex similarly was violative of the state equal rights amendment.

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[46] 11 Wash. App. 247, 522 P.2d 1187 (1974). Two states with ERAs have taken care to treat the question of homosexual marriages legislatively. "Only a marriage between a man and a woman is valid in this State." 62 Md. Code Ann. § 1 (1976 Supp.). *See also* Va. Code § 20-45.2.

[47] 11 Wash. App. at ______, 522 P.2d at 1192.

[48] Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973). *See also* Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), *cert. denied*, 409 U.S. 810 (1972).

[49] 388 U.S. 1 (1967).

The Washington court rejected this argument by the *Singer* appellants stating that *Loving* did not "change the basic definition of marriage as the legal union of one man and one woman; rather (it) merely held that the race of the man or woman desiring to enter that relationship could not be considered by the state in granting a marriage license."[50] It seems, however, that the Washington court was simply playing word games.

There is no doubt that the institution of marriage was fundamentally changed by the *Loving* decision. Up until the date of *Loving* there was no way that a black and a white could marry in Virginia and a number of other states. Although the anti-miscegenation statutes were not as ancient in lineage[51] as the one man/one woman rule for entering marriage, they certainly defined the institution of marriage. To say that this situation is unlike *Loving* because that case involved race and this involves sex is simply to avoid the issue. The question is whether the state equal rights amendment would mandate the same kind of change with regard to sex as the Fourteenth Amendment did with regard to race.

This is not to say that the *Singer* result was incorrect. Before we can make any intelligent conclusion as to the question of the legality of same-sex marriages under a state ERA, we must canvass the issues systematically. The possible impact of a state ERA on the asserted right to homosexual marriage can profitably be studied under a mode of analysis borrowed from that of the Fourteenth Amendment's Equal Protection Clause. The right to homosexual marriage might exist independently and, thus, be guaranteed to members of both sexes under the Equal Rights Amendment. Alternatively, if this independent right doesn't exist, it might possibly come into existence by force of the ERA itself. The argument would be that granting heterosexuals the right to marry and denying the same right to homosexuals would be unequal treatment on the basis of the sex of the individual applying for the marriage license.

Three possible sources exist for the independent right to homosexual marriage. It can be asserted as an element of the right to privacy under the recent penumbral analysis adopted by the Supreme Court. This claim, however, seems doomed to failure because of the distinction between the recent Supreme Court cases announcing the doctrine and the homosexual marriage situation. In all the Supreme Court cases announcing this right of privacy, the claimants have been seeking the right to be let alone.[52] By contrast, in the homosexual marriage context the claimants would not be seeking to be let alone, but instead seeking the state's endorsement of their activity by conferral of the marriage status. It should also be noticed that in a recent *per curiam* affirmance, the Supreme Court refused to accept, in the criminal context, the claim of homosexuals that their right to privacy protected their homosexual acts.[53]

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[50] 11 Wash. App. at ______, 522 P.2d at 1192.

[51] For an interesting account of the history of the Virginia anti-miscegenation laws, tracing the phenomenon to colonial days, see Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 Va. L. Rev. 1189 (1966).

Another possible claim might be under the Ninth Amendment, the argument being that this right is one reserved to the people as against intrusion by the states. Mr. Justice Goldberg's *Griswold* concurrence, the leading recent exposition of the Ninth Amendment, however, clearly limits its scope to those rights fundamental and part of the fabric of society.[54] Homosexual marriage could hardly be so characterized.

The final possible claim of an independent right would be under the due process clause of the Fourteenth Amendment. *Skinner v. Oklahoma*[55] does describe marriage as part of an individual's due process rights but does so in the context of procreation. This is obviously inapposite to the homosexual's claim.

Aside from an independent source of the right to homosexual marriage, the alternative analysis would be that the state, by extending the right to marry B (a female) to all males, would be discriminating on the basis of sex if it denied the right to all females. In any jurisdiction applying an absolute standard of review under the ERA, this argument would seem to be a winning one. However, if a less encompassing standard is used, there must be an analysis of the interests on both sides before a conclusion can be reached.

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[52] *For example,* the defendants in Griswold v. Connecticut, 381 U.S. 479 (1965), were seeking the right to use contraceptives in the privacy of their "marital bedroom" without the intrusion of the state. The defendant in Stanley v. Georgia, 394 U.S. 557 (1969), was seeking the right to privately possess obscene matter. The same kind of analysis is applicable to Roe v. Wade, 410 U.S. 113 (1973).

[53] Doe v. Commonwealth's Attorney for City of Richmond, 425 U.S. 901, *rehearing denied,* 425 U.S. 985 (1976).

[54] "In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and (collective) conscience of our people' to determine whether a principle is 'so rooted (there) . . . as to be ranked as fundamental.'" Griswold v. Connecticut, 381 U.S. 479, 493 (Goldberg, J., concurring) (1965).

[55] 316 U.S. 535 (1942).

This article cannot attempt to provide a finely meshed calculus with which to predict unerringly the result of a claim under any particular standard of review which might be applied. What can be done usefully is to identify the relevant interests of each party which should be considered in determining the impact on an equal rights amendment on the institution of homosexual marriage. Of course, the less restrictive the test, the less of an interest the state will need to show to justify its ban on homosexual marriages.

What are the interests of the homosexual which ought to be considered in the determination of the right to enter the marriage relationship? One commentator has summarized these interests as follows:

> [S]tate sanctioning of the marriage relationship brings with it numerous . . . legal, social and even psychic benefits which are of undiminished importance to homosexuals. Married individuals enjoy substantial tax benefits, tort recovery for wrongful death, intestate succession, and a host of other statutory and common law privileges. . . . Beyond these strictly legal benefits, the formal status of marriage might reasonably be viewed as enhancing the stability, respectability, and emotional depth of any relationship between two individuals, regardless of whether the relationship is homosexual or heterosexual.[56]

It might be added, however, that there is some indication that the importance of the legal benefits accruing to the homosexual entering into marriage may be diminished in the future. For example, the Supreme Court in *U.S.D.A. v. Moreno,*[57] held that the federal government could not constitutionally limit food stamp programs to households of related people. To the extent that this type of holding is expanded in the future, homosexuals will not "need" the marital relationship in order to gain the fringe legal benefits involved.

The interests of the state in denying the right to enter into a homosexual marriage are not so neatly categorized. There are two basic interests: the interest in preserving the marital relationship for the procreation of children and the interest in society in enforcing its moral judgments through its refusal to authorize what it views as "unnatural" activity.

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[56] Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 579-80 (1973).
[57] 413 U.S. 528 (1973).

The traditional role of marriage as the institution which authorizes and legitimates the procreation of children cannot be questioned. The state, therefore, can argue that it has an interest in maintaining the institution for these purposes only. The argument is severely eroded, however, by the fact that states regularly grant marriage licenses to couples who have no possibility of procreating, such as elderly or sterile pairs. The argument that the state does not *have* to bar all those marriages it *could* bar is not sufficient. This kind of argument has been accepted only in the situation where remedial legislation is involved.[58]

A more fundamental interest of the state, however, is in preserving its moral code. The Judeo-Christian ethic has consistently been adamant against homosexual behavior.[59] Our society, because it is a society, has the right to enforce its moral code through its marriage laws. The leading proponent of this point of view is Lord Devlin, who stated that "(S)ociety is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions."[60] Devlin wrote in the context of the criminal law, justifying society's making criminal an act which it found to be immoral. In the homosexual marriage context, the argument need not be so sweeping. One can concur, for example, with H.L.A. Hart's criticism of Devlin in the criminal context,[61] yet still agree that society can validly refuse to authorize a relationship which it finds immoral and against the laws of nature.

It might be suggested that the ERA itself demonstrates society's recognition of the validity of homosexual marriage and, in effect, removes the moral stigma attached to it. Difficult as it is to ascertain the "moral sense" of the community, one can hardly believe that a substantial portion of any ratifying jurisdiction thought that it was permitting homosexual marriage by enactment of the equal rights amendment. In fact, considerable time is often spent by ERA proponents in denying that homosexual marriages will be permitted automatically by the amendment.[62]

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[58] *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106 (1949).

[59] The Torah reflects a fundamental objection to homosexuality. *See Leviticus* 18:22. By the late Middle Ages, in the Christian Church, homosexuality was "identified with heresy and often punishable by death." Note, *supra* note 56, at 577, n. 17.

[60] P. DEVLIN, THE ENFORCEMENT OF MORALS 20 (1959).

[61] HART, THE MORALITY OF THE CRIMINAL LAW (1965); Hart, *Immorality and Treason*, 62 LISTENER 163 (1959).

[62] The *Singer* court went to great lengths to document the fact that proponents of the

Acceptance of this type of interest in preserving the moral code of society in the homosexual marriage context will not threaten the evisceration of the ERA generally. There is no deeply held societal and religious ethic which bars, for example, males from having custody of children or forbids women from paying alimony. The question of homosexual marriage is unique and involves strong societal emotions. Therefore, society can argue that it can deny entrance into an institution because the sexual activity authorized within it would be seen as immoral if practiced by homosexuals.

Before we can conclude the cataloguing and evaluating of the state interest in refusing entry into marriage by homosexuals, we must note a recent possible erosion of these interests. The traditional role of marriage has ranked high in the framework of society. As the Supreme Court of the United States recently wrote, marriage has had a "basic position . . . in this society's hierarchy of values."[63] In recent years, however, two separate developments have indicated that the institution of marriage may not be as revered as it once was.

Within the past decade almost all states have enacted no fault divorce statutes permitting parties to leave the marriage without alleging one of the traditional fault grounds for divorce.[64] These statutes, hailed as milestones in domestic relations law because they remove perjury and sordid details from the divorce court, have had the concomitant effect of making marriage an easily severed relationship. Several recent Supreme Court of Georgia cases illustrate the extreme case of dissolving the marital relationship on the grounds of "irretrievable breakdown" or incompatibility.

In *McCoy v. McCoy,*[65] the husband filed for a no-fault divorce and, at the trial of the case, testified that there was no "conceivable chance that he and his wife could ever get back together." He stated that whether the court granted him his divorce or not, he would not resume the marriage with his wife. The wife resisted the divorce petition, asserting that there were reasonable grounds for

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Washington ERA consistently denied that its enactment would have any legitimating effect on homosexual marriages. 522 P.2d at 1190-91, n. 5.

[63] Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

[64] "[I]n 1976 there were only three states (Illinois, Pennsylvania, and South Dakota) which did not have some no-fault ground for divorce and change appeared imminent even in these three states." PLOSCOWE, FOSTER & FREED, FAMILY LAW CASES AND MATERIALS (2d ed. 1975) (1977 Supplement) at 6.

[65] 236 Ga. 633, 225 S.E.2d 682 (1976).

reconciliation and that she still loved her husband. The Georgia Supreme Court held that the lower court erred in denying this divorce. "Just as it takes two consenting parties to make a contract," the court wrote, "it takes two consenting parties to make a reconciliation."[66] The same court took this logic one step further in *Manning v. Manning*. The divorce petitioner had filed an affidavit along with his petition asserting that "The separation between us is complete and permanent. . . . There is no possibility whatever of a reconciliation ever taking place between us. The marriage . . . is irretrievably broken." The divorce was granted as a matter of law, citing *McCoy*.[67]

The relevance of such statutes and interpretative decisions to the law of marriage is striking. To the extent that the states move toward administrative divorce, they are forfeiting their right to hold the marital relationship out as something special, sacred and important to society. To the extent that parties are permitted to opt out of marriage, it becomes much less an important institution and much more a contract. To the extent that it becomes easier to get out of marriage, the state loses its claim that marriage should be difficult to get into.

An even more explicit move toward marriage as a contract and an erosion in the state interest of protecting the institution of marriage can be seen in the recent California case, *Marvin v. Marvin*.[68] Here the Supreme Court of California held that the woman at the conclusion of an "illicit" relationship would have a claim in *quantum meruit* for the difference between the reasonable value of household services rendered and the reasonable value of support received. This *quantum meruit* action may be the forerunner of broad treatment of parties to a marriage as parties to a purely civil contract.[69] If the unmarried woman is entitled to such an action, surely the married woman would be likewise entitled.

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[66] 236 Ga. at 634, 225 S.E.2d at 683.

[67] Manning v. Manning, 237 Ga. 746, 229 S.E.2d 611 (1976). The concurring justice in *Manning* wrote, "I see little difference between this and permitting one of the parties to write "Cancelled" on the marriage license and mail it in. . . ."

[68] ____ Cal.3d ____, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). For a complete discussion of the *Marvin* case and its implications, see Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 Fam. L.Q. 101 (1976).

[69] As Professor Clark has recently written, the new marriage is not the same as the traditional institution. All that can be said with confidence is that it is "some sort of relationship between two individuals, of indeterminate duration, involving some kind of sexual conduct, entailing vague mutual property and support obligations, that may be formed by consent of both parties and dissolved at the will of either." Clark, *The New Marriage*, 12 Willamette L.J. 441, 451 (1976).

In sum, the state's purported interest in preserving the doctrine of marriage against the onslaught of homosexuals is eroded by developments which analogize marriage to a purely civil contract. Insofar as it is a purely civil contract, everybody should be able to enter into the relationship. Under this kind of analysis, the state would retain a legitimate interest in regulating the entry into marriage only as it regulates the entry into other contracts.

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